Federal Arbitration Act, 9 U.S.C. § 2:

> A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

STATEMENT OF THE CASE

This Petition requests this Court's review of the Montana Supreme Court's decision in one of twenty-three actions[4] against Piper Jaffray that allege generally that a former Account Executive, Mr. O'Neill, in Piper Jaffray's branch office in Butte, Montana had engaged in improper conduct with respect to accounts of plaintiffs in each of the twenty-three lawsuits.[5]

Respondent, whose underlying complaint strictly alleges wrongdoing in his Self Directed IRA Account ("IRA Account"), opened this account with Piper Jaffray on or

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[4] The twenty-three lawsuits, and the status of each, may be found in the Appendix at 102.

[5] On January 12, 2005 Mr. O'Neill pled guilty to two counts of unauthorized trading in the accounts of two (2) clients with whom Piper Jaffray has reached settlements. Mr. O'Neill was sentenced on April 29, 2005. He is required to make restitution to Piper Jaffray in the amount of $308,000, representing amounts which Piper Jaffray paid into a restitution fund available to all plaintiffs, including Respondent, as part of the settlement with the Montana Auditor's Office and Securities Department arising out of O'Neill's and Piper Jaffray's alleged misconduct.

about May 2, 1997. In so doing, Respondent executed a Self Directed IRA Account Agreement ("IRA Agreement") containing a pre-dispute arbitration provision. The pre-dispute arbitration provision conforms to the language required by the securities self-regulatory organizations, the New York Stock Exchange, Inc. ("NYSE") and the National Association of Securities Dealers, Inc. ("NASD"), and is typical of arbitration provisions found in virtually every customer account agreement used in the securities industry throughout the United States.

The plain language of the IRA Agreement clearly demonstrates Respondent's acceptance of arbitration. The IRA Agreement provides in pertinent part:

> **. . . I agree to arbitrate any disputes between Piper Jaffray and me. I specifically agree and recognize that all controversies which may arise between Piper Jaffray, its agents, representatives or employees and me, concerning any transaction, account or the construction, performance or breach of this or any other agreement between Piper Jaffray and me, whether entered into prior, on, or subsequent to the date hereof, shall be determined by arbitration to the full extent provided by law. . . .**

(Bold type in original).[6]

The IRA Agreement also contains Respondent's written acknowledgement of receipt of a copy of the agreement and acknowledgement of the arbitration provision itself as it states directly above Respondent's signature:

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[6] The complete arbitration provision contained in the IRA Agreement may be found at App. 89-90.

I UNDERSTAND THAT THIS AGREEMENT CONTAINS A PRE-DISPUTE ARBITRATION CLAUSE AT PARAGRAPH 4 ABOVE, AND I ACKNOWLEDGE RECEIPT OF A COPY OF THIS AGREEMENT.

(Bold and all capital lettering in original).

When Respondent initiated litigation with regard to his IRA Account, Piper Jaffray demanded Respondent submit the dispute to arbitration in accord with the plain terms of the IRA Agreement. Respondent refused to arbitrate, and Piper Jaffray then moved the state district court to compel arbitration. After conducting evidentiary hearings, and conducting a joint hearing in which expert testimony was taken and made applicable to all twenty-three cases, three district court judges held that all arbitration provisions in all account agreements at issue in all twenty-three lawsuits were unenforceable.

Piper Jaffray appealed all decisions to the Montana Supreme Court except one which settled. Of the twenty-three cases, thirteen have settled, six were denied certiorari by this Court, one is awaiting decision by this Court on a pending petition for Writ of Certiorari, two were recently decided by the Montana Supreme Court (including the one at issue here), and one was remanded to the Trial Court for further findings. (App. 102).

The first decision of the Montana Supreme Court was *Willems v. U.S. Bancorp Piper Jaffray Inc., et al.*, 2005 MT 37, 107 P.3d 465 (decided February 22, 2005). (App. 54-66).[7] The Montana Supreme Court later entered its

[7] *Willems* settled shortly before the Montana Supreme Court issued its opinion and before the parties had moved to dismiss the appeal as moot. As a result, *Willems* is not one of the cases for which review by this Court can be sought.

decision in the case at issue here and incorporated its analysis in *Willems* as the basis for its decision. (App. 1-3).

In *Willems*, the Montana Supreme Court held that language found in a Piper Jaffray PAT Plus Account Agreement, which contains a margin agreement and is a fundamentally different type of account than the IRA Account presented in this action, granted discretionary authority to Piper Jaffray which, in turn, created a fiduciary duty owed by Piper Jaffray to its customers to explain the arbitration provision contained in Mr. Willems' PAT Plus Agreement, and no other contract provision, *before* the customer even executed the account agreement. *Id.* at ¶¶ 24-28 (App. at 64-65). The Court found Piper Jaffray breached that fiduciary duty. *Id.* at ¶ 28 (App. at 65).

The margin agreement within the PAT Plus Agreement permitted customers to purchase securities with funds loaned from Piper Jaffray, so long as the customers maintain a certain balance in their accounts. This margin provision, which the Montana Supreme Court found created a fiduciary duty even before the agreement was signed, pertains to Piper Jaffray's rights to protect itself upon the death or incapacity of the customer in case the customers' securities decline in value and Piper Jaffray is at risk of not being repaid the funds it loaned the customer. The provision is as follows:

> **Customer's Orders Binding Until Notice of Death**
>
> Upon your death or failure to comply with any part of this Agreement or whenever Piper Jaffray deems it necessary for its protection, Piper Jaffray is authorized (but is not required) to:
>
> – Cancel outstanding orders;

– Purchase, sell, assign, receive and deliver all or any part of the securities held or carried for you; and

– Close out short sales by purchase upon any exchanged board or market any public or private sale at Piper Jaffray's option.

Willems at ¶ 17 (App. at 60).

Importantly, this margin agreement provision found in the PAT Plus Account Agreement with its purported grant of discretionary authority is *not* contained in the IRA Agreement, which governs the only account in which wrongdoing is alleged in the Respondent's underlying action. In fact, the IRA Agreement *cannot* even offer a margin agreement by law. *See gen.* 26 U.S.C. § 408. Instead of focusing on the actual agreement at issue which could not create the fiduciary duty relied upon in *Willems*, the Montana Supreme Court simply found that Respondent opened an earlier PAT Plus Account with Piper Jaffray, and that based upon that prior account agreement a fiduciary duty was created at that time requiring the broker to explain the arbitration provision present in the PAT Plus Account Agreement and also in the later IRA Agreement – apparently in more detail than the explicit written explanation and notice provisions already provided therein.[8] While Respondent here previously opened a PAT Plus Account with Piper Jaffray, the fiduciary duty which allegedly arose out of that PAT Plus Account Agreement

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[8] Such a ruling certainly differs from the Montana Supreme Court's handling of the case of *Zigrang v. U.S. Bancorp Piper Jaffray Inc., et al.*, 2005 MT 282, 107 P.3d 465 (decided November 8, 2005). (App. 91-101). There, the plaintiff never opened a PAT Plus Account with Piper Jaffray and only held an IRA account. The Montana Supreme Court recognized that the fiduciary duty to explain arbitration arising out of the terms of the PAT Plus Agreement could not apply, as the District Court had erroneously found, and *Zigrang* was remanded to the District Court for further findings regarding the IRA account.

should not be imported to Respondent's later IRA Account, which was not, and could not have been, a discretionary account by law.

The Montana Supreme Court also erroneously rejected Piper Jaffray's arguments that the margin agreement provision found in the PAT Plus Account Agreement is not effective until the agreement is signed, that the provision does not grant Piper Jaffray unfettered discretion in the account, but only grants limited discretion to Piper Jaffray *after* the agreement is executed and upon death or incapacity of the customer, that Piper Jaffray must include this language to comply with federal regulations concerning margin accounts, and that an unfettered grant of discretion cannot derive from the middle of a provision concerning Piper Jaffray's rights upon a customer's death. *Willems* at ¶¶ 17-28 (App. at 60-65).

REASONS FOR GRANTING THE WRIT

Introduction

Since 1994, when the Montana Supreme Court rendered its first opinion in *Casarotto v. Lombardi*, 268 Mont. 369, 886 P.2d 931 (1994) ("*Casarotto I*"), the Montana judiciary has evidenced a hostility toward arbitration and has rejected arguments that the Federal Arbitration Act pre-empts the attempts of both the Montana legislature and judiciary to void pre-dispute arbitration agreements in matters clearly involving interstate commerce.

In *Casaratto I*, a Montana statute required any contract containing an arbitration provision to place a notice of the arbitration provision on the first page of the contract otherwise the arbitration provision was invalid and unenforceable. The Montana Supreme Court held this requirement did not violate the Federal Arbitration Act. *Casarotto I*, 268 Mont. at 382, 886 P.2d at 939. Justice Trieweiler's

specially concurring opinion provides compelling insight into the Montana Supreme Court's hostility toward the Federal Arbitration Act and well-settled law favoring arbitration as a means of dispute resolution: "I am particularly offended by the attitude of federal judges [who favor arbitration as an alternative dispute resolution mechanism which relieves crowded court dockets]. . . . [I]f the Federal Arbitration Act is to be interpreted as broadly as some of the decisions of our federal courts would suggest, then it presents a serious issue regarding separation of powers." *Casarotto I*, 286 Mont. at 382-385, 886 P.2d at 939-941.

This Court granted certiorari, *decided sub nom Doctor's Associates v. Casarotto,* 515 U.S. 1129 (1995), and ordered that the judgment of the Montana Supreme Court be vacated and remanded for further consideration in light of this Court's then-recent decision, *Allied-Bruce Terminix Cos. v. Dobson,* 513 U.S. 265 (1995).

Upon remand, the Montana Supreme Court affirmed its prior decision. *Casarotto v. Lombardi*, 274 Mont. 3, 901 P.2d 596 (1995) ("*Casarotto II*"). This Court again granted certiorari and reversed the decision of the Montana Supreme Court, *decided sub nom Doctor's Associates, Inc. v. Casarotto,* 517 U.S. 681 (1996), holding the statute solely applicable to arbitration clauses violated the Federal Arbitration Act.

The Montana Supreme Court's hostility toward the Federal Arbitration Act and arbitration has not abated since *Casarotto*. *See, e.g., Keystone, Inc. v. Triad Systems Corp.*, 1998 MT 326, 292 Mont. 229, 971 P.2d 1240 (1998) (invalidating portion of arbitration clause that required parties to arbitrate disputes outside Montana); *Iwen v. U.S. West Direct*, 293 Mont. 512, 977 P.2d 989 (1999) (striking arbitration provision in advertising contract as "unconscionable"); *Kingston v. Ameritrade, Inc.*, 302 Mont. 90, 12 P.3d 929 (2000) (validity of arbitration provision in

an agreement to be decided by court where validity of underlying agreement not at issue); *Kloss v. Edward D. Jones*, 2002 MT 129, 54 P.3d 1, (2002), *cert. denied,* 538 U.S. 956 (2003) (arbitration provision not within the client's reasonable expectation and existence of an on-going fiduciary relationship required explanation of arbitration provision).

The Montana Supreme Court's decision at issue here continues this hostility towards arbitration by imposing a heightened duty on broker-dealers and brokers to explain arbitration provisions, but no other contract provisions, to the customer before the customer even signs the agreement creating the duty, and invalidating arbitration agreements in securities accounts as a whole. The Montana Supreme Court's decision, therefore, violates the Federal Arbitration Act and hinders the ability of broker-dealers to rely upon standardized contracts nationwide in violation of the Commerce Clause.

The Montana Supreme Court's imposed heightened duty to explain arbitration provisions to customers is in direct conflict with decisions of four other State Supreme Courts. *Dinsmore v. Piper Jaffray*, 593 N.W.2d 41 (S.D. 1999) (finding fiduciary duties are not owed when parties are dealing at arm's length; Piper Jaffray acts on its own behalf when negotiating and executing account agreements); *Rosenthal v. Great Western Financial Securities Corp.*, 926 P.2d 1061 (Cal. 1996) (finding fiduciary duties of a broker do not extend to orally alerting the customer to the existence of an arbitration clause or explaining its meaning and effect); *Jones v. Merrill Lynch, Pierce, Fenner & Smith*, 604 So.2d 332 (Ala. 1991) (finding absence of explanation by broker-dealer of arbitration agreement to customer does not constitute a breach of a fiduciary duty); *ABM Farms, Inc. v. Woods*, 692 N.E.2d 574 (Ohio 1998) (finding law did not require

broker-dealer to explain arbitration provision, or any other aspect of contract to party prior to signing).

In fact, the U.S. Court of Appeals for the Seventh Circuit has squarely put the burden on the *investor* to inquire about the arbitration clause. *Pierson v. Dean, Witter, Reynolds, Inc.*, 742 F.2d 334 (7th Cir. 1984) (investors cannot use their failure to inquire about the ramifications of the arbitration clause to avoid the consequences of agreed-to arbitration in claiming the clause is unconscionable.)

Also, the Montana Supreme Court's wholesale invalidation of arbitration agreements approved by the U.S. Securities and Exchange Commission ("SEC") and used throughout the entire securities industry is contrary to decisions from at least three Federal Courts of Appeals and sixteen State Supreme Courts which routinely enforce these highly regulated arbitration provisions in securities account agreements. *See* section II, *infra*. Only the Supreme Judicial Court of Maine has taken a hostile view of arbitration provisions in securities agreements akin to the Montana decision. *Barrett v. McDonald Investments*, 870 A.2d 146, 151 (Me. 2005). The Maine decision invalidated a pre-dispute arbitration provision in a securities agreement and candidly explained that its decision was "a retreat from [its] previously broad presumption in favor of arbitration." *Id.* at 151. The concurring opinion elaborated by stating appellate courts are starting to distinguish and weaken U.S. Supreme Court precedent pertaining to arbitration. *Id.* at 152-53 (Alexander, J., concurring).

The Montana Supreme Court's improper imposition of unique and heightened standards for arbitration provisions and invalidation of arbitration provisions themselves in securities agreements disrupts the operations of the entire securities industry. National securities firms including Piper

Jaffray routinely rely upon unilaterally drafted customer contracts containing SEC approved arbitration agreements. Based upon the Montana Supreme Court's decision at issue here, Montana-only account agreements and procedures would be required to be implemented by broker-dealers operating in a national securities market. Tailoring its agreements to comply with Montana' strict arbitration agreement standards could potentially force Piper Jaffray into non-compliance with national regulations concerning mandatory language in arbitration provisions in securities agreements. The decision also raises questions about the enforceability of arbitration provisions in securities agreements when a customer with an existing account agreement moves to Montana, or moves from Montana to another state.

Not only will the Montana decision adversely affect all broker-dealers doing business in Montana, but its impact will be felt far beyond the securities industry. This decision is not limited to Piper Jaffray, the securities industry or Montana. It will be used to invalidate arbitration provisions contained in any standardized contract routinely used nationwide by any business. In fact, the concurring opinion in *Barrett, supra*, after concluding appellate courts are eroding U.S. Supreme Court precedent relating to arbitration, cites a Ninth Circuit decision invalidating an arbitration provision in a franchise agreement, and a Second Circuit decision invalidating an arbitration provision in a reinsurance contract, in addition to citing *Willems*, the basis for the Montana decision at issue here. *Id.* at 152-53 (Alexander, J., concurring).

Moreover, a Florida Supreme Court decision invalidating an arbitration provision and distinguishing this Court's ruling in *Prima Paint Corp. v. Flood & Conklin*

Mfg. Co., 388 U.S. 395 (1967) is currently pending before this Court. *Buckeye Check Cashing, Inc. v. Cardegna, et al.*, Case No. 04-1264. In *Prima Paint*, this Court held the Federal Arbitration Act does not permit a party to avoid enforcement of an arbitration agreement by claiming the underlying contract, but not the arbitration agreement contained in the contract, was fraudulently induced. *Prima Paint* at 406. In *Buckeye*, the Florida Supreme Court distinguished *Prima Paint* by concluding that the contract in *Prima Paint* was *voidable*, whereas the contract in Buckeye was *void. Buckeye, supra.* This Court granted certiorari in *Buckeye* on June 20, 2005, and heard oral arguments on November 29, 2005.

The Florida Supreme Court in *Buckeye* focused on the validity of the underlying contract as grounds to avoid enforcement of the arbitration agreement. Unlike *Buckeye*, the Montana Supreme Court here focused solely on invalidating the arbitration agreement by creating special rules for arbitration agreements only, while apparently conceding the validity of other contract terms. In fact, the Montana Supreme Court made it effortless for any investor to attack the arbitration agreement and avoid enforcement of the arbitration agreement by creating standards that only apply to arbitration provisions and which are so strict and so unique, that no broker-dealer could possibly comply with them. No state, including Montana, can apply special standards to arbitration in violation of the Federal Arbitration Act and *Casarotto* in order to make it easier for customers to attack arbitration clauses and thus avoid enforcement of arbitration agreements in compliance with *Prima Paint*.

Addressing the Montana Supreme Court decision here along with *Buckeye* will allow this Court to comprehensively and uniformly address enforcement of arbitration

agreements contained in standardized agreements used across the entire United States and to reinforce this Court's precedent pertaining to arbitration, both in situations where the underlying contract as a whole is attacked and where the attack is leveled solely against the arbitration clause. Absent this Court's intervention, Montana will continue to improperly apply special heightened standards to arbitration clauses causing disruption throughout the securities industry and creating a basis for other courts to erode this Court's previous rulings favoring arbitration agreements in the highly regulated securities industry.

I. The Montana Supreme Court violates the Federal Arbitration Act and frustrates the national policy of favoring arbitration as a means of dispute resolution through its unique judicially imposed requirement that pre-dispute arbitration clauses commonly contained in securities industry customer agreements must be explained to the customer before the agreement is even executed, which requirement is not applied to any other contract provisions in Montana and in direct conflict with decisions of four State Supreme Courts and five Federal District Courts.

It is well established that a national policy favoring arbitration is at the heart of the Federal Arbitration Act. *Southland Corp. v. Keating*, 465 U.S. 1, 10 (1984); *see also First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 945 (1995); *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 631 (1985). The *Southland* Court, in reversing the California Supreme Court, determined that section 2 of the Federal Arbitration Act applies to state court decisions and preempts conflicting state laws. *Southland*,

supra, at 16. And, in *Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220 (1987), this Court held that national policy applicable to securities industry claims, stating:

> [W]e are well past the time when judicial suspicion of the desirability of arbitration and of the competence of arbitral tribunals should inhibit enforcement of the Act in controversies based on statutes.

Id. at 226 (citations omitted).[9]

The national policy in favor of arbitration preempts state laws that infringe upon the domain Congress encompassed within the Federal Arbitration Act. For example, in *Perry v. Thomas*, 482 U.S. 483 (1987), this Court held that section 2 of the Federal Arbitration Act preempted a provision of the California Labor Code that permitted court actions to collect wages, notwithstanding any private agreement to arbitrate such a dispute. In dicta, the *Perry* Court stated that a court may not "rely on the uniqueness of an agreement to arbitrate as a basis for a state-law holding that enforcement would be unconscionable, for this would enable the court to effect what we hold today the state legislature cannot." *Perry, supra*, at 492, n. 9.

In the instant case, the Montana Supreme Court has done precisely what this Court counseled against in *Perry* by holding pre-dispute arbitration provisions to higher or different standards than other provisions in the contracts. The Montana Court held a substantive provision contained in a previously entered PAT Plus Account Agreement

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[9] Correspondingly, prior Montana law also provides a state policy favoring arbitration. *Chor v. Piper, Jaffray & Hopwood, Inc.*, 261 Mont. 143, 148, 862 P.2d 26, 29 (1993); *Vukasin v. D.A. Davidson & Co.*, 241 Mont. 126, 133, 785 P.2d 713, 718 (1990).

created a fiduciary duty requiring Piper Jaffray to explain the arbitration provision, and no other contract provision, to its clients *prior* to execution of that contract and a later IRA Agreement.[10] The Montana Supreme Court ignored the clear holding of *Doctor's Associates, Inc. v. Casarotto, supra*, and the dicta in *Perry, supra*, by imposing a heightened legal standard to an arbitration provision, and not to any other contract provision. This violates the Federal Arbitration Act.

Section 2 of the Federal Arbitration Act "makes enforceable a written arbitration provision in 'a contract *evidencing* a transaction *involving* commerce.' 9 U.S.C. § 2." *Allied-Bruce, supra*, at 836 (emphasis in original). As this Court further explained, section 2 also allows states to "regulate contracts, including arbitration clauses, under general contract law principles and they may invalidate an arbitration clause 'upon such grounds as exist at law or in equity for the revocation of *any* contract.' 9 U.S.C. § 2 (emphasis added). What States may not do is decide that a contract is fair enough to enforce its basic terms (price, service, credit), but not fair enough to enforce its arbitration clause." *Id.* at 281.

In the case at bar, the Montana Supreme Court clearly imposed a higher and separate burden on arbitration provisions than any other contract provisions. To do so, it found the following language contained in a previously executed PAT Plus Account Agreement[11] created a fiduciary duty:

[10] The decision does not discuss how this explanation is to be provided or memorialized. Must the explanation be in writing? Must it be recorded? Does it require the client to sign a separate document acknowledging that the explanation had been provided?

[11] Of course, the PAT Plus Account Agreement is not even the basis for the complaint in this action.

> **Customer's Orders Binding Until Notice of Death**
>
> Upon your death or failure to comply with any part of this Agreement or whenever Piper Jaffray deems it necessary for its protection, Piper Jaffray is authorized (but is not required) to:
>
> – Cancel outstanding orders;
>
> – Purchase, sell, assign, receive and deliver all or any part of the securities held or carried for you; and
>
> – Close out short sales by purchase upon any exchanged board or market any public or private sale at Piper Jaffray's option.

Willems, supra ¶ 17. The Montana Supreme Court held this fiduciary duty includes an obligation of the broker to explain the arbitration provision to the customer *before* the customer signs the agreement.

This position completely ignores the fact that the contract at issue here does not and cannot even contain such language and, therefore, should not be subject to this same fiduciary duty. This position also ignores the fact that the IRA Agreement clearly and specifically advises the client of the existence of the arbitration provision. The arbitration notice is found above the signature block and provides that, by signing the agreement, the client acknowledges the existence of the arbitration clause. The language on the signature page of the IRA Agreement clearly and unambiguously informs the customer that the IRA Agreement contains arbitration provisions and acknowledges receipt of the agreement. The notice provision is generally in all capital and bold lettering, and directs the signer to the location of the arbitration provision in the IRA Agreement. Therefore, any customers who sign the signature page of any IRA Agreement cannot do so

without first seeing the arbitration notice provision which clearly refers to the arbitration clause. Further, the language used in both the arbitration clause and the notice provision has been approved by the Securities Exchange Commission ("SEC") and is consistent with the requirements imposed by both the NYSE and NASD which are themselves overseen by the SEC. In light of the above, the inescapable conclusion is that the Montana Supreme Court's hostility toward arbitration was so great that it completely ignored the very terms and nature of the IRA Agreement at issue in its zeal to import a fiduciary duty from an allegedly discretionary account which should otherwise stand separate.

Notwithstanding this, the Montana Supreme Court, as its only basis for voiding the arbitration provision in Respondent's PAT Plus Account Agreement and in the later IRA Agreement, held Piper Jaffray had a fiduciary duty to explain the arbitration provision to each customer *before* the customer signed the respective agreements. This conclusion stands contract law on its head and creates a special requirement applicable only to arbitration provisions.

Montana contract law acknowledges that a written contract is only effective at delivery – not prior to delivery and certainly not prior to execution. *See, generally.*, Mont. Code Ann. § 28-2-906. It also recognizes that a party to a contract is generally bound by all terms of a signed contract, regardless of which terms were read. *See, generally, Wiley v. Iverson*, 295 Mont. 511, 518, 985 P.2d 1176, 1181 (1999); *see also*, *Schlemmer v. North Central Life Co.*, 307 Mont. 203, 206-207, 37 P.3d 63, 65 (2001) (where language in an insurance application is clear and unambiguous, plaintiff did not deny signing it, and contract has notation directly above signature block attesting to signatory's understanding of the document, plaintiff's professed claim

of ignorance as to the application's contents "cannot prevail.") Furthermore, Montana law provides there is no fiduciary duty between an investment advisor and his or her client absent a grant of discretionary authority, which never occurred and could never occur with regard to the IRA Account. *See Chor v. Piper Jaffray*, 261 Mont. 143, 153, 862 P.2d 26, 32 (1993).

Further, the Montana Court did not require Piper Jaffray to explain any other provision or condition in the account agreements before the Respondent executed them, including the margin provision the Court found created the fiduciary duty. The arbitration provision is thus impermissibly singled out and treated like no other provision. This requirement is as offensive and impermissible as the statutory requirement stricken in *Doctor's Associates, supra*, 517 U.S. 681, that notice of the existence of the arbitration provision be provided on the first page of the agreement.

The Montana Supreme Court's imposed heightened duty to explain arbitration provisions to customers is in direct conflict with decisions of four other State Supreme Courts, one involving Piper Jaffray. In *Dinsmore v. Piper Jaffray*, 593 N.W.2d 41 (S.D. 1999), an investor brought an action against Piper Jaffray and its broker alleging the broker engaged in improper trading practices. *Id.* at 43. Piper Jaffray moved to compel arbitration based upon arbitration provisions contained in the account agreements for the accounts of which the investor complained. The trial court denied Piper Jaffray's motion holding Piper Jaffray had a fiduciary duty to explain the arbitration provisions to the investor and that Piper Jaffray breached that duty which allowed the investor to avoid enforcement of the arbitration agreement. *Id.* at 45. Piper Jaffray appealed. After examining the Federal Arbitration Act,

this Court's decision in *Allied-Bruce Terminix Int'l Co., v. Dobson*, 513 U.S. 265 (1995), and pertinent state law, the Supreme Court of South Dakota reversed the trial court's decision and held Piper Jaffray did not have a fiduciary duty to explain the arbitration agreement because the parties were dealing at arm's length when they were negotiating and executing the agreements. *Id.* at 47. The Court explained:

> By the actual process of negotiating and executing these contracts Piper does not manage [the investor's] property nor does it act for or on behalf of [the investor]. Piper acts on its own behalf.

Id.

Similarly, in *Rosenthal v. Great Western Financial Securities Corp.*, 926 P.2d 1061 (Cal. 1996), investors brought an action against a broker-dealer and its broker alleging various tort claims. *Id.* at 1061. The broker-dealer filed a motion to compel arbitration based upon arbitration provisions contained in the account agreements at issue. *Id.* at 1061. The trial court denied the motion and the broker-dealer appealed. *Id.* at 1061. On appeal, the investors argued the broker-dealer had a fiduciary duty to explain the arbitration provision and the broker-dealer breached that duty, therefore, the investors could avoid enforcement of the arbitration agreement. *Id.* at 1080. After considering the Federal Arbitration Act, the California Supreme Court reversed the denial of the motion to compel arbitration and found the broker-dealer did not have a fiduciary duty to explain the arbitration provision. The Court stated:

> At the times the claimed nondisclosures occurred, no agency relationship had yet been formed, and those aspects of a broker's duty that derive from his or her role as the investor's agent are therefore not applicable. Under these circumstances, we find no authority for the proposition

> the fiduciary obligations of a broker extend to orally alerting the customer to the existence of an arbitration clause or explaining its meaning and effect

Id.

The Alabama Supreme Court and Ohio Supreme Court also agree that a broker does not have a duty to explain an arbitration clause to a customer. *Jones v. Merrill Lynch, Pierce, Fenner & Smith*, 604 So.2d 332 (Ala. 1991) (finding absence of explanation by broker-dealer of arbitration agreement to customer does not constitute a breach of a fiduciary duty); *ABM Farms, Inc. v. Woods*, 692 N.E.2d 574 (Ohio 1998) (finding law did not require broker-dealer to explain arbitration provision, or any other aspect of contract to party prior to signing).

The Montana Supreme Court's imposed fiduciary duty requirement is also contrary to decisions of five Federal District Courts. *Gouger v. Bear, Stearns & Co., Inc.*, 823 F.Supp. 282 (E.D.Pa. 1993) (finding a broker's duty does not require an explanation to the customer of the arbitration agreement); *Bender v. Smith Barney, Harris Upham & Co. Inc.*, 789 F.Supp. 155 (D.N.J. 1992) (extending law that brokers are not required as a matter of law to disclose or explain arbitration clauses to the customer to find broker-dealer had no duty to disclose arbitration clause to broker in Form U-4 agreement); *Curtis v. Newhard, Cook & Co., Inc.*, 725 F.Supp. 1072 (E.D.Mo. 1989) (finding brokers are not required as a matter of law to disclose or explain arbitration clauses to the customer); *Benoay v. E.F. Hutton & Co. Inc.*, 699 F.Supp. 1523 (S.D. Fla. 1988) (finding customer could not avoid arbitration by claiming arbitration clause was not explained to her); *Rush v. Oppenheimer & Co. Inc.*, 681 F.Supp. 1045 (S.D.N.Y. 1988) (holding brokers are not

required as a matter of law to disclose or explain arbitration clauses to the customer).

Further, the U.S. Court of Appeals for the Seventh Circuit while not addressing the broker's duty, found the customer cannot avoid arbitration if the customer failed to inquire or chose not to inquire about the arbitration clause. *Pierson v. Dean, Witter, Reynolds, Inc.*, 742 F.2d 334 (7th Cir. 1984) (customers cannot use their failure to inquire about the ramifications of the arbitration clause to avoid the consequences of agreed-to arbitration in claiming the clause is unconscionable.) Moreover, the Supreme Courts of Texas and California found the arbitration agreement itself adequately explained arbitration to the customer. *In re McKinney*, 167 S.W.3d 833 (Tex. 2005); *see also*, *Rosenthal* at 1080, *supra*. (arbitration agreement includes an explanation of meaning of arbitration, that arbitration is final and binding, that parties to arbitration waive their right to jury trial, and that judicial review of the award is "strictly limited.")

In sum, the Montana Supreme Court, in its hostility towards arbitration, has seized upon a unique interpretation of principles of contract law to void the arbitration clause, and only the arbitration clause, in the Respondent's contract and imported provisions of a separate, allegedly discretionary account which is not even the subject of this action to do so. Arbitration in Montana is not only disfavored, but barred from use by the securities industry based upon this unique and result-oriented judicial interpretation of principles of contract law to find the arbitration clause unenforceable. A Writ of Certiorari should be issued here expressly because these decisions are directly contrary to this Court's precedent.

II. The Montana Supreme Court's wholesale invalidation of pre-dispute arbitration clauses common in the securities industry is out of step with at least three U.S. Courts of Appeal and sixteen State Supreme Courts which routinely enforce arbitration clauses contained within customer agreements in the securities industry, but in step with one decision from the Supreme Judicial Court of Maine, resulting in a split which must be reconciled in favor of enforceability to protect the national policy favoring arbitration.

It is beyond dispute that the securities industry generally, and the relationship between broker-dealers and their customers in particular, are matters in interstate commerce, 15 U.S.C. § 78(b)(1), and thus come within the Federal Arbitration Act. In this instance, the decisions of the Montana Supreme Court at issue here interfere with the arrangement between broker-dealers located in other states and their Montana customers who are investors in national securities markets. Firms like Piper Jaffray, operating as broker-dealers in the heavily regulated securities industry, routinely rely upon unilaterally drafted customer contracts. In fact, the SEC requires firms to use certain language in its arbitration provisions, which language is set forth in Rule 3110 of the NASD Manual. These contracts are executed by broker-dealers and their customers throughout the country.

There is a reasonable expectation that arbitration clauses are found in agreements between broker-dealers and their clients. Indeed, prior to these Montana decisions, this expectation has been part of Montana contract law and has been discussed in connection with arbitration

clauses in brokerage agreements. See, *Passage v. Prudential-Bache Securities Inc.*, 223 Mont. 60, 66, 727 P.2d 1298, 1302 (1986) ("Such predispute arbitration agreements are not outside the reasonable expectations of the investor.") (citing, *Finkle and Ross v. A.G. Becker Paribas, Inc.*, 622 F.Supp. 1505, 1511-1512 (S.D.N.Y. 1985)).

The prevalence and the use of arbitration in the securities industry is evidenced by recent statistics published by the NASD. In the last five years alone the NASD has administered over 33,000 arbitrations. During that time, of those claims decided by NASD arbitration panels, approximately 55% resulted in awards in favor of the investor. In 2004 alone, the NASD administered over 9,000 arbitrations.

Not only are pre-dispute arbitration provisions usually and customarily employed in the securities industry, but their use has been acknowledged and accepted by this Court as a legitimate and fundamentally fair means of resolving disputes between broker-dealers and their customers. *Shearson/American Express, Inc.*, 482 U.S. at 237. In fact, Montana law prior to the *Casarotto* decisions held that "agreement[s] to arbitrate disputes in accordance with SEC-approved procedures are not unconscionable as a matter of law." *Chor v. Piper, Jaffray & Hopwood, Inc.*, 261 Mont. 143, 149-150, 962 P.2d 26, 30 (1993) (*citing Cohen v. Wedbush, Noble, Cooke, Inc.*, 841 F.2d 282, 286 (9th Cir. 1988) (overturned on other grounds)).

Indeed, several U.S. Courts of Appeal recognize the enforceability of pre-dispute arbitration provisions in contracts between broker-dealers and their clients. *See, e.g.*, *Threlkeld v. Metallgesellschaft Ltd.*, 923 F.2d 245 (2nd Cir. 1991) (agreements between American investor and British metal futures trader would not be stricken as contracts of adhesion, so as to release investor from obligation to arbitrate dispute.); *Securities Industry Ass'n v. Connolly*, 883

F.2d 1114 (1st Cir. 1989) (Federal Arbitration Act preempted Massachusetts from adopting regulations requiring arbitration clauses in pre-dispute arbitration agreements between broker-dealers and their customers to be conspicuous and to be subject to full written disclosure concerning their legal effect); *Pierson v. Dean, Witter Reynolds, Inc.*, 742 F.2d 334 (7th Cir. 1984) (found arbitration provision in contract between customer and investment brokerage firm would not be held unconscionable absent evidence beyond mere allegations of unfairness.)

At least sixteen State Supreme Courts also regularly enforce pre-dispute arbitration provisions in securities contracts.[12]

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[12] *Investment Management & Research, Inc. v. Hamilton*, 727 So. 2d 71, 78 (Ala. 1999) ("Because Hamilton claimed fraud in the inducement of the customer-agreement contract generally, as opposed to the arbitration clause specifically, Hamilton's claims against IMR are subject to arbitration according to the terms of the customer agreement he signed."); *Jones v. Merrill Lynch, Pierce, Fenner & Smith*, 604 So.2d 332 (Ala. 1991) (finding absence of explanation by broker dealer of arbitration agreement to customer does not constitute a breach of a fiduciary duty); *American Ins. Co. v. Cazort*, 871 S.W.2d 575 (Ark. 1994) (holding that the issuer could compel the investor into arbitration even though the issuer was not a signatory to the arbitration agreement between the investor and the broker); *Rosenthal v. Great Western Financial Securities Corp.*, 926 P.2d 1061 (Cal. 1996) (finding fiduciary duties of a broker do not extend to orally alerting the customer to the existence of an arbitration clause or explaining its meaning and effect); *ABM Farms, Inc. v. Woods*, 692 N.E.2d 574 (Ohio 1998) (finding law did not require broker dealer to explain arbitration provision, or any other aspect of contract to party prior to signing); *Oppenheimer & Co., Inc. v. Young*, 475 So.2d 221 (Fla. 1985) (approving broker's right to arbitration of dispute pursuant to arbitration clause despite claims by investors even through broker did not pointlessly invoke the arbitration agreement in a prior federal court action); *Fairview Cemetery Assoc. v. Eckberg*, 385 N.W.2d 812, 821 (Minn. 1986) (Held that the investors "Minnesota Blue Sky Law and related common law claims are therefore subject to arbitration."); *Smith Barney, Inc. v. Henry*, 775 So.2d 722,

(Continued on following page)

727 (Miss. 2001) ("Further, the arbitration provisions survive the death of Hilliard and the termination of the agreements and bind Henry as a successor of Hilliard."); *State ex. rel. PaineWebber, Inc., v. Voorhees*, 891 S.W.2d 126, 130 (Mo. 1995) ("Arbitration Act requires a court to stay a lawsuit pending arbitration where as here the parties agree in writing to arbitrate a dispute from a contract that involves commerce."); *Dowd v. First Omaha Securities Corp.*, 495 N.W.2d 36 (Neb. 1993); (Requiring arbitration of dispute, despite plaintiff's challenge of the impartiality of the arbitration panel); *Financial Network Investment Corp. v. Becker*, 741 N.Y.S.2d 837, 838 (N.Y. Supp. 2002) ("When valid arbitration agreement covering the dispute is shown, arbitration is required"); *David v. Merrill Lynch, Pierce, Fenner and Smith, Inc.*, 440 N.W.2d 269, 275 (N.D. 1989) ("We conclude that the arbitration agreement is applicable to David's claims against Williams and Merrill Lynch Commodities, Inc."); *Dean Witter Reynolds, Inc. v. Shear*, 796 P.2d 296, 302 (Okla. 1990) (concurring opinion) ("[P]arties to a commodities contract (should) be allowed to *knowingly* and *intentionally* waive the right to trial by jury by agreeing to submit contractual controversies to arbitration.") (emphasis in original); *Dickler v. Shearson Lehman Hutton, Inc.*, 596 A.2d 860, 867 (Pa. Super. Ct. 1991) ("Given the three paths down which this litigation can be directed – compelled individual arbitration, class action in a court of law, or compelled classwide arbitration – the last choice best serves the dual interest of respecting and advancing contractually agreed upon arbitration agreements while allowing individuals who believe they have been wronged to have an economically feasible route to get injunctive relief from large institutions employing adhesion contracts."); *Carlsten v. Oscar Gruss & Son, Inc.*, 853 A.2d 1191, 1194 (R.I.2004) ("[P]arties who voluntarily contract to use arbitration as an expeditious and informal means of private dispute resolution are bound by the terms of their agreement."); *Dinsmore v. Piper Jaffray*, 593 N.W.2d 41 (S.D. 1999) (finding fiduciary duties are not owed when parties are dealing at arm's length; Piper Jaffray acts on its own behalf when negotiating and executing account agreements); *Cantella & Co., Inc. v. Goodwin*, 924 S.W.2d. 943, 944 (Tex. 1996) ("Once a party seeking to compel arbitration establishes that an agreement exists under the FAA, and that the claims raised are within the agreement's scope, the trial court 'has no discretion but to compel arbitration and stay its proceedings pending arbitration.'"); *Garmo v. Dean, Witter, Reynolds, Inc.*, 681 P.2d 253, 255 (Wash. 1984) ("We hold that the supremacy clause of the federal constitution prevails and, thus, the federal arbitration law requires enforcement of arbitration clauses in brokerage agreements.")

The Supreme Judicial Court of Maine, however, has recently taken a position similar to that of the Montana Supreme Court in contravention of these pro arbitration decisions. In *Barrett v. McDonald Investments*, 870 A.2d 146 (Me. 2005), the Maine Court in a "retreat from [its] previously broad presumption in favor of arbitration," invalidated an arbitration clause in an agreement between a broker-dealer and a customer because it found the arbitration clause ambiguous as to whether it pertained to the broker giving advice. *Id.* at 151. The concurring opinion expanded on the Court's rationale and even cited the Montana Supreme Court's decision at issue here in support of its retreat:

> The passage of time and events, particularly the increased use of contracts of adhesion containing mandatory arbitration clauses to avoid judicial enforcement of federal and state anti-discrimination and consumer protection laws, is leading many appellate courts to distinguish and weaken the significance of these [U.S. Supreme Court] precedents from an earlier time in the development of arbitration law . . . *Willems v. U.S. Bancorp Piper Jaffray, Inc.*, 2005 MT 37, ¶¶ 1, 27-28, 326 Mont. 103, 107 P.3d 465, 470 . . .

Id. at 153 (Alexander, J., concurring).

Granting the Writ of Certiorari is appropriate here because the decision below is out of step with several U.S. Courts of Appeal and virtually every other state which enforces pre-dispute arbitration provisions in the securities industry. This is of national importance because the Montana decisions will disrupt the whole securities industry because Montana-only account agreements and procedures would be required to be implemented by broker-dealers. Furthermore, if other states use Montana's decision as

support to retreat from enforcing arbitration agreements and place special requirements on arbitration, like the Supreme Judicial Court of Maine, broker-dealers will have to tailor their agreements for each one of those states, further burdening the securities industry nationwide.

III. The Montana Supreme Court violates the Commerce Clause through its wholesale invalidation of pre-dispute arbitration provisions common in the securities industry which impermissibly interferes with the relationship between broker-dealers and their customers in interstate commerce.

The United States Constitution gives Congress alone the power "[t]o regulate Commerce with foreign Nations, and among the several States. . . ." U.S. Const. art. I, § 8, cl. 3. Under this clause, Congress "is empowered to regulate and protect the instrumentalities of interstate commerce, or persons or things in interstate commerce, even though the threat may come only from intrastate activities." *Pierce County, Wash. v. Guillen*, 537 U.S. 129, 147 (2003), citing, *United States v. Lopez*, 514 U.S. 549, 558 (1995) (citations omitted).

Even in areas where Congress has not exercised this authority, state regulations may violate the Commerce Clause either because the regulations discriminate against interstate or foreign commerce, or because they incidentally affect such commerce. *Camps Newfound/Owatonna, Inc. v. Town of Harrison, Maine, et al.*, 520 U.S 564 (1997). Discrimination against interstate commerce can be evident either on a statute's face, or in its practical effect. *See e.g., Wyoming v. Oklahoma*, 502 U.S. 437, 456 (1992). As explained by this Court over fifty years ago:

> Our system, fostered by the Commerce Clause, is that every farmer and every craftsman shall be encouraged to produce by the certainty that he will have free access to every market in the Nation, that no home embargoes will withhold his export, and no foreign state will by customs duties or regulations exclude them. Likewise, every consumer may look to the free competition from every producing area in the Nation to protect him from exploitation by any. Such was the intent of the Founders; such has been the doctrine of this Court which has given it reality.

H.P. Hood & Sons, Inc. v. Du Mond, 336 U.S. 525, 539 (1949).

Here, the practical effect of the Montana Court's decision is to create a situation whereby firms, such as Piper Jaffray, which conduct business in interstate commerce and routinely utilize unilaterally drafted contracts whose terms are influenced and governed by federal statutes and regulations and whose arbitration provisions are approved by the SEC and the Self-Regulatory Organizations, such as the NYSE and the NASD, overseen by and under the jurisdiction of the SEC, will not be able to rely upon such contracts if executed in Montana by Montana clients. However, such contracts are valid everywhere else in the United States, except perhaps in Maine. The decision also calls into doubt the enforceability of such provisions if a customer with an existing arbitration agreement moves to Montana, or moves from Montana to another state. This impairs free access to the state of Montana by Piper Jaffray as only customer contracts without arbitration clauses are seemingly permissible. Such undue restriction on choice of dispute resolution and, indeed, the freedom to contract is in violation of the Federal Arbitration Act, and only serves to impair the contract rights of firms such as Piper Jaffray seeking to bring access to the

various national securities markets and exchanges to Montana. The decision below thus operates an undue and substantial burden on interstate commerce and, in practical effect, violates the Commerce Clause.

The result of this unique propensity of the Montana judiciary to void arbitration agreements in Montana will hinder national broker-dealer firms' abilities to operate uniformly throughout the United States. This result offends the Commerce Clause by impeding interstate commerce and, as noted above, is out of step with virtually every other jurisdiction which recognizes the enforceability of arbitration clauses in the securities industry.

CONCLUSION

The enforceability of arbitration clauses is clearly under siege in Montana, and a dangerous precedent has been set wherein a state court with a proven anti-arbitration history can effectively ban arbitration through a tortured and uneven application of state law. At least in Montana, one commentator has indeed suggested that the battle is already over.

> Inevitably a national corporation, like the Subway sandwich franchisor in *Casarotto*, will not tailor its arbitration clause or its waiver of rights to the requirements the Montana Supreme Court enumerated in *Kloss* and the arbitration provision will be struck down. The U.S. Supreme Court held in *Casarotto* that the legislature could not enact provisions that restrict arbitration in that situation. And in footnote three to that case, it warned the courts not to do what the legislature may not do. [citation omitted] But the Montana Supreme Court has now accomplished what the legislature was unable to do – the regulation if not the prohibition

> of pre-dispute arbitration clauses in Montana. It is possible that the higher court will right this wrong, or even that a reconstituted Montana Supreme Court will see things differently. Until that time, however, arbitration is dead in Montana.

Scott J. Burnham,[13] *The War Against Arbitration in Montana*, 66 Mont. L. Rev. 139, 200 (2005). Absent immediate intervention by this Court, the Montana Supreme Court's continuing refusal to heed this Court's rulings or enforce the Federal Arbitration Act will be assured, and this position will likely only spread, causing an inevitable hollowing of the so-called national policy favoring arbitration.

For the foregoing reasons, Petitioners respectfully request that this Court grant their Petition for Writ of Certiorari to the Montana Supreme Court be issued.

RESPECTFULLY submitted this 27th day of January 2006.

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[13] Scott J. Burnham is a Professor of Law at the University of Montana School of Law. Scott J. Burnham, *The War Against Arbitration in Montana*, 66 Mont. L. Rev. 139, fn.1 (2005).

No. 04-452

IN THE SUPREME COURT OF
THE STATE OF MONTANA

2005 MT 243N

STEPHEN C. TOMAZICH,

Plaintiff and Respondent,

v.

U.S. BANCORP PIPER JAFFRAY, INC.,
ROBERT ENGLISH, and THOMAS J. O'NEILL,

Defendants and Appellants,

APPEAL FROM: District Court of the Second Judicial District, In and for the County of Silver Bow, Cause No. DV 02-131, The Honorable Kurt D. Krueger, Judge presiding.

COUNSEL OF RECORD:

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For Respondent Tomazich:

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Submitted Briefs: March 30, 2005

Decided: September 27, 2005

Filed:

/s/ Ed Smith
Clerk

¶ 1 Pursuant to § I, para. 3(c), Montana Supreme Court 1996 Internal Operating Rules, the following decision shall not be cited as precedent. It shall be filed as a public document with the Clerk of the Supreme Court and its case title, Supreme Court cause number and disposition shall be included in this Court's quarterly list of noncitable cases published in the Pacific Reporter and Montana Reports.

¶ 2 The case is one of 23 different actions against U.S. Bancorp Piper Jaffray, Inc., (Piper) involving the alleged mismanagement of accounts in the corporation's Butte office. This particular action involves several forms, the first of which was signed by Stephen Tomazich (Tomazich) in 1993.

¶ 3 These facts and the issues arising here are substantially identical to those in *Willems v. U.S. Bancorp Piper Jaffray, Inc.*, 2005 MT 37, ¶ 22, 326 Mont. 103, ¶ 22, 107 P.3d 465, ¶ 22. That case held that a clause granting Piper broad discretion over an investor's holdings created a fiduciary duty. *Willems*, ¶ 22. That same clause, in addition to the arbitration clause, was included as part of Tomazich's 1993 PAT Plus Agreement. *Willems*, ¶ 17. *Willems* further held that because of the fiduciary duty, Piper was obligated to advise the investor of the arbitration clause, and that

because Piper did not, the arbitration clause was unenforceable. *Willems,* ¶ 25.

¶ 4 Here, in light of *Willems,* O'Neill owed a fiduciary duty to Tomazich to explain the arbitration provisions in the contracts at issue, beginning therein with the 1993 form. Further, Tomazich relied on Thomas O'Neill's (O'Neill) expertise in the business transactions at issue and trusted him to look out for his best interest and expected him to explain any important contract terms. However, O'Neill failed to explain to Tomazich the consequences of the arbitration provisions that Tomazich was found to have not understood. Therefore, we affirm the District Court's conclusion that the pre-dispute arbitration provisions are unenforceable and decline to address further issues raised by appellants.

/s/ John Warner
Justice

We Concur:

/s/ W. William Leaphart

/s/ Patricia Cotter

/s/ James Nelson

/s/ Brian Morris

KURT KRUEGER
DISTRICT COURT JUDGE, DEPT. I
SILVER BOW COUNTY COURTHOUSE
155 W. GRANITE ST.
BUTTE, MT 59701
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MONTANA SECOND JUDICIAL DISTRICT COURT,
SILVER BOW COUNTY

STEPHEN C. TOMAZICH, Plaintiff, -vs- U.S. BANCORP PIPER JAFFRAY INC., PIPER JAFFRAY, INC., ROBERT ENGLISH and THOMAS J. O'NEILL, Defendants.	CAUSE NO. DV-02-131 FINDINGS OF FACT CONCLUSIONS OF LAW & ORDER

INTRODUCTION

(Filed Apr. 7, 2004)

Almost two dozen individuals who were investors with Piper Jaffray (Piper) at its Branch Office in Butte, MT, have filed suits in the above-referenced cases against Piper as a result of its business practices and those of its account executive, Tom O'Neill. The lawsuits involve the investors' individual investment accounts which were created and maintained at the Butte office. While, of course, the circumstances surrounding the opening and maintenance of these accounts vary somewhat among those Plaintiffs, there is a similar, if not identical, fact pattern with respect to the essential facts surrounding the actual creation and maintenance of those accounts.

Plaintiffs allege a number of common law tort claims which arise from a variety of illegal business practices, such as "churning," unauthorized trading, and inappropriate trading. Plaintiffs allege that Piper failed to properly supervise O'Neill, who was at the time of his misconduct was subject to a Consent Decree with the Montana State Auditor. The decree arose out of prior misconduct of O'Neill which had been uncovered following an administrative investigation in the early 1990's. Piper had a duty to supervise O'Neill to insure that his misconduct and unethical practices as a broker would not be repeated. Plaintiffs allege that Piper not only allowed, but encouraged, O'Neill to repeat the proscribed business practices which had given rise to the Consent Decree.

Defendants have filed Motions to Compel Arbitration in all of the above-referenced cases. The motions gave rise to a series of hearings by the three Montana District Court Judges to whom these Piper cases have been assigned, Hon. Kurt Krueger, Hon. John W. Whelan, and Hon. Thomas M. McKittrick. Individual hearings took place with respect to many of the Plaintiffs who have a pending claim against Piper. Additionally, the three judges, sitting in an *en banc* configuration, heard the testimony, and received evidence, from "common expert witnesses" and "common fact witnesses." Those "common witness" hearings took place on August 12, 2003, and September 3, 2003, at which Plaintiffs called Professor William Corbett as a common expert witness. Plaintiffs called Jerry Campbell, a former Piper account executive, as a common fact witness. Defendants called Michael Perino, of New York, and Wendy Harmsen, of Minneapolis, as common expert and fact witnesses, respectively.

In a prior discovery deposition, Defendant Tom O'Neill refused to respond to questioning regarding the opening and formation of Plaintiffs' accounts, citing his Fifth Amendment right against self-incrimination. Thus, there was no testimony presented by Defendants to refute the testimony of any Plaintiff with regard to the opening and maintenance of the account documents which they had signed which contained the pre-dispute arbitration clauses which are the basis of Defendants' motion to compel arbitration.

Following the conclusion of these common hearings, the parties submitted their post-hearing briefs on October 10, 2003.

FINDINGS OF FACT

A. Factual Findings Regarding Tomazich Account(s)

1. Steve Tomazich suffers from the mental and physical disability hydrocephalus. Tr. S. Tomazich, 8/6/03, pp. 18-19.

2. Mr. Tomazich was an unsophisticated consumer. In fact, Mr. Tomazich had never signed contracts before. Tr. S. Tomazich, 8/6/03, p. 48.

3. Mr. Tomazich relied on Mr. O'Neill's expertise in these business transactions and trusted him to look out for his best interest and expected him to explain the important and salient contract terms. Tr. S. Tomazich 8/6/03, p. 56, ll. 7-15.

4. Mr. O'Neill had known the Tomazich family over the years. He had worked with both Steve and his sister, Trudy, at the Montana Power Company, where Steve

worked in the mail room. When their mother was ill, Mr. O'Neill had volunteered to pick up milk for the family or do whatever he could to help. Tr. S. Tomazich, 8/6/03, pp. 58-59.

5. Mr. O'Neill inquired of Steve's condition whenever he spoke with Steve's sister, Trudy, and thus was continuously apprised of his condition. Tr. T. Tomazich, 8/16/03, pp. 77-78.

6. Based on this relationship over the years, Mr. Tomazich trusted Mr. O'Neill with his finances, and to do what was in his best interest. In hindsight, Mr. Tomazich now realizes that Mr. O'Neill took advantage of his disabilities, singling his own individual account out relative to those of his sister and his father, who have no infirmities and whose accounts O'Neill did not tamper with. Tr. S. Tomazich, 8/6/03, p. 58, ll. 6-12.

7. Mr. Tomazich moreover signed the account forms on which Piper Jaffray relies in its motion when he was suffering from serious seizure conditions, and could not concentrate and did not understand his surroundings. In fact, shortly after having signed the TOD account signature page presented by Piper Jaffray, Mr. Tomazich became hospitalized at the Mayo Clinic as a result of his essential tremors (seizures). Tr. S. Tomazich, 8/f6/03, pp. 51-52, Tr. T. Tomazich, pp. 79-91. By the time he signed the IRA account form which is at issue in the instant litigation, in addition to generally being unable to read and understand forms such as the ones at issue in this case, Steve could no longer work, and despite his repeated efforts to return to work, was placed on permanent disability as a result of the seizures he suffered.

8. Despite knowledge of his condition, in presenting these forms to Steve, Mr. O'Neill did not advise him of the salient features of their accounts, including the arbitration clause contained in the contracts. Tr. S. Tomazich, 8/6/03, pp. 27-28.

9. Steve expected Mr. O'Neill to explain to him what he was signing if there was something of great importance, such as a waiver of constitutional rights. Steve did not understand or appreciate that, by signing the forms that Mr. O'Neill presented to him, without explanation, he was waiving any of his constitutional rights. Tr. S. Tomazich, 8/6/03, p. 61-63.

10. This provision was not explained to Steve.

11. Mr. O'Neill refused to testify in this matter when, based upon the advise of counsel, he invoked his 5th Amendment privilege. Tr. O'Neill, 8/6/03, p. 64-66.

12. It is thus undisputed that Defendant O'Neill, like the broker in *Kloss,* did not explain to Mr. Tomazich that by signing the account forms, he was waiving his right of access to this state's courts, his right to reasonable discovery, his right to findings of fact based on the evidence, his right to a jury trial, and his right to enforce the law applicable to their case by appeal. Defendants also did not explain that the intent of the document was that the Plaintiff instead be subjected to an oppressive and unconscionable process in which basic and essential factors of fairness, including those identified by the *Kloss* court, are waived in favor of the securities industry, and to the detriment of the Plaintiff.

13. Defendants had the opportunity to refute the testimony of Plaintiffs regarding Plaintiffs' lack of understanding of the Account Agreements and failure to read the documents, but did not do so.

B. <u>Contracts of Adhesion (Common Findings)</u>

14. The contracts at issue in the instant case are standardized form contracts, prepared by Piper Jaffray that first came out in 1993. Tr. Harmsen, at 212, ll. 16-19, Exhibit 4.

15. Piper Jaffray had superior bargaining power in the transactions at issue herein, relative to the Plaintiffs.

16. The provisions of these form contracts, and in particular the arbitration provisions, are drafted in accordance with industry practice and standards to conform to rules promulgated by the self-regulating organizations (SROs) that govern the entire securities industry. *See* Tr. Perino, 9/03/03, at 44, ll. 13-19.

17. These contracts and the arbitration provisions they contain are, on their face, contracts of adhesion, in that the form language provides no "opt-out" provision with regard to the arbitration clause, or any other contract provisions. Tr. Corbett, 8/12/03, at 60-61. The customer is provided no opportunity on the face of the document to select or consent to certain provisions, and not to others. A signature on the document purports to bind the consumer investors to all of the contract terms. Tr. Harmsen, at 215, ll. 9-14, Hearing Ex. 4.

18. These account forms, prepared by Piper Jaffray, were presented to the Plaintiffs on a "take it or leave it" basis, in accordance with the manner in which brokers are

trained by Piper Jaffray to present these forms to their clients and prospective clients. *See* Tr. Campbell, 9/03/03, 11, ll. 17-21.

19. Moreover, the new PAT Plus forms presented to some of the plaintiffs for their signatures in 1993 were enclosed with a cover letter, advising that if the customers did not accept the terms of the new account forms, they would be transferred to a fee-paying account. Tr. Harmsen, 9/03/03, at 213, ll. 5-25; 214, ll. 1-25; 215, ll. 1-14. Thus, not only were the contracts presented on a "take it or leave it" basis, but additionally, on a "take it or pay a fee" basis.

20. The letter, while purporting to advise customers of the essential new account terms, failed to inform the Butte branch customers that the new PAT Plus forms contained a pre-dispute arbitration clause, which for many customers, would be included within their account agreements for the first time. Tr. Harmsen, 213-215.

21. Plaintiffs herein had no bargaining power or meaningful opportunity to negotiate the terms of their contracts, including the arbitration provision.

22. Piper Jaffray's ostensible "opt out" policy relating to the arbitration clause alone, but to no other provisions in the form contracts, does not provide investors with a meaningful choice in opting out of the arbitration provision.

23. According to this "policy," branch managers are given discretion to permit a customer, at the customer's request, to cross out the arbitration clause in the account agreement forms, after making a cost benefit analysis. Tr. Harmsen, at 217, ll. 15-24, Hearing Ex. 4 (policy).

24. Piper does not apprise potential investors of the existence of the supposed "opt out" policy. Piper's investment executives who open new accounts in accordance with Piper Jaffray's policies, procedures and training do not inform or apprise their customers either of the existence of the arbitration clause, or of the alleged "opt out" policy. Tr. Harmsen, 9/03/03, 216, ll. 15-25. *See* also Tr. Campbell, 9/03/03, 11, ll. 17-25, and 12, ll. 1-7.

25. To be able to take advantage of this "opt out" option, the Plaintiffs in this litigation would have had to have initiated the discussion with O'Neill, and then questioned whether it would be possible to cross out the arbitration provision. Even then, the determination of whether this would be permissible would be made by the local Branch Manager on the basis of "cost-benefit" considerations.

26. The "policy" itself is highly suspect. The physical "policy" appears to be comprised of a two-page memorandum dated 1989, a two page document in an entire different font that in any event could not have existed prior to 1998, three pages in yet a different font that appear to be summaries of three different account types and have nothing to do with arbitration clauses, and multiple pages that appear to be Piper standard forms in which the arbitration clause is crossed off and various initials appear by the cross-outs. Hearing Ex. 4; Tr. English, 8/06/03 (Tomazich hearing), at 69-70, ll. 24-1; 8/08/03 (Emett/Merrett hearing), at 93, ll. 1-5, 8.

27. Notwithstanding serious challenges to the authenticity of the alleged written policy (i.e., Ms. Harmsen's testimony in which she did not retrieve the policy herself, her alternative references to the policy as a 26-page and a

38-page policy, together with the general physical composition of the "policy"), the alleged "policy" appears to be a collection of anecdotal or sample instances in which Piper Jaffray may have waived the arbitration provision after making a cost-benefit analysis of the projected profitability of opening large institutional accounts. Hearing Ex. 4, Tr. Harmsen at 238, ll. 12-25, 239, ll. 1-25, 240, ll. 1-25, 241, ll. 1-25, and 242, ll. 1-14.

28. This opt-out provision was not reasonably available to the average consumer-investor, with relatively small amounts to invest, such as the Plaintiffs in this litigation. Tr. Harmsen at 215.

29. The alleged "opt out" policy was not known to the Butte branch office, from which each Plaintiffs' accounts originated. Both the Branch Manager (Bob English) and Mr. Campbell had never heard of such a policy, and the so-called "policy" itself is centrally maintained in Minneapolis, and not distributed to the branches. Tr. Harmsen at 175-180; 216, ll. 15-25. Tr. Campbell at 8, ll. 2-25, 9, ll. 1-25, 10, ll. 1-25, 11, ll. 1-25, 12, ll. 1-7, and 20, ll. 1-13. Tr. English, 8/08/03, pp. 91-98.

30. It would have been impossible for the Butte office to have implemented the supposed opt-out policy with regard to the Plaintiffs in this litigation without having any knowledge of its existence. This is particularly true in light of the fact that the option lies completely within the discretion of the Butte branch manager and he had no knowledge whatsoever that he had such discretion, and learned of the so-called policy for the first time when it was raised in this litigation.

31. Plaintiffs did not have any notice of their supposed opportunity to negotiate or reject the arbitration

clause. The contracts, on their face, provide no indication that the arbitration provision is optional, and can be crossed out Piper Jaffray did not inform Plaintiffs that the arbitration provision was negotiable.

32. The Plaintiffs in the instant litigations had no actual, meaningful or reasonable choice to negotiate or exercise any discretion with regard to the arbitration provision contained in the standardized Piper Jaffray form contracts.

33. Investors such as Plaintiffs face the possibility of being excluded from the securities market unless they accept Piper Jaffray's contract with such an agreement to arbitrate.

C. Unconscionability Pursuant to the Eight (8) *Kloss* Factors (Common Findings).

34. It is undisputed that under NASD and NYSE rules, one of the three arbitrators must be affiliated with the securities industry. There is no concomitant requirement that an arbitrator must be affiliated with the industry in which the small investor, or "one time player," is employed. The securities industry will always be requested by one third of the panel represented by it. There is clearly a disparity of representation which is inherently suspect. Tr. Corbett, 8/12/03, at 65-66. Advocates for the securities industry itself have recognized that this disproportionate representation creates an appearance of a pro-industry bias. Tr. Perino, 9/03/03, at 76-77; Ruder, *Elements of a Fair and Efficient Securities Arbitration System*, 40 Ariz. L. Rev. 1101, 1103 (1998).

35. Repeat players are favored in securities arbitrations as opposed to workers or consumers who are unlikely to be involved in arbitration more than one time. According to Professor William Corbett of the University of Montana Law School, a very experienced labor arbitrator in the Pacific Northwest, and whose testimony the Court finds credible, empirical studies conducted by legal commentators have concluded that arbitrators tend to favor repeat players. Tr. Corbett, 8/12/03, at 66-67; 96. This conclusion has been reached by the D.C. Circuit Court of Appeals in *Cole v. Burns International Security Services,* 105 F.2d 1465, 1476 (D.C. Cir. 1997).

36. Filing fees for securities arbitration under NASD rules are substantial and far greater than the filing fees imposed in the Montana district courts. It is undisputed that the filing fees for such claims are in the range of $1,400 and $1,500, for a filing fee and a hearing deposit for a single-day hearing. Tr. Corbett, 8/12/03, at 68. This conclusion was not disputed by Piper's retained expert, Michael Perino. Tr. Perino, 9/03/03, at 155. Fees at the rate of $450 per day for each additional day of a hearing are charged to the participants.

37. Securities arbitration under the required NASD or NYSE rules impose significant arbitrator fees which make small claims prohibitive and discriminate against investors of modest means. In addition to the formal filing fees, an investor located in Montana would be required to either seek a waiver of the requirement that the arbitration be held in a state which has a NASD District Office, and then pay the lodging and travel expenses of the arbitrators who are required to travel from their states of residence to Montana, or pay the expenses of Montana witnesses who would be required to travel to an arbitration

forum outside of Montana to testify. Tr. Corbett, 8/12/03, at 58-59; 60.

38. Additionally, arbitrator fees are $400 per session day, plus $75 additional for the chair person of the three-member panel, or $1,275 per day. Thus, if a case were to last five days, arbitrator fees alone would amount to $6,375, not to mention travel and related lodging expenses. The court in *State of West Virginia ex rel. James Dunlap v. Berger,* 211 W.Va. 549, 567 S.E.2d 265 (2002), held that arbitrators' fees similar or identical to those discussed by Professor Corbett "would impose unreasonably burdensome costs . . . " upon litigants and were thus unconstitutional because "such fees are unlike anything that a litigant would have to pay to pursue his statutory claims in court." 567 S.E.2d at 281-282, and note 13. In contrast, in the Montana district courts, like West Virginia, no litigant is required to pay for the daily fees or expenses of either judges or juries.

39. The NASD and NYSE rules require private arbitration proceedings, which result in summary decisions which provide no basis or opportunity for an explanation of the findings of the arbitrators, or the applicable law upon which the decision is based. These rules specifically preclude written decisions explaining their findings of fact and conclusions of law. *Corbett Report,* Plaintiffs' Exhibit 3, at 13. Professor Corbett concluded that the failure to provide a written, explanatory decision is not only intentional, but touted as an "advantage" of securities' arbitration because the decision makers are not "burdened" with the obligation to explain their decisions. There are no recognized public law reporting publications of securities decisions. This "penchant for secrecy" is an accepted feature of securities arbitration, and may therefore

frustrate a litigant's effort to seek a vacatur of the award in the courts, and may conceal an intentional disregard of the law. Davis, *The Arbitration Claws: Unconscionability in the Securities Industry*, 78 Boston Univ. L. Rev. 255, 311 (1998). Additionally, as Professor Corbett points out, the failure to explain decision making may obscure biased or erroneous decision making. *Corbett Report*, Plaintiffs' Exhibit 3, *supra*, at 14-15. Securities arbitration proceedings have thus become "shrouded in secrecy" because they are conducted in private forums which exclude public decision making. As a result, wrongdoing or other oppressive conduct by the securities industry or its members precludes any meaningful exposure of such conduct and activities. *Id.*

40. Securities arbitration is expressly designed to excuse arbitrators from being bound by the facts or law. It is also expressly designed to preclude arbitrators from disclosing to the parties written reasons which would explain the basis of their decision. Plaintiffs' Exhibit 6. The pre-dispute arbitration provision at issue in this case recites that –

> The arbitrators' award is not required to include factual findings or legal reasoning and any party's right of appeal to seek modification of rulings is strictly limited.

41. Many legal commentators have rightfully criticized the securities industry for insisting that its arbitration processes be expressly designed to preclude explanatory decisions which can serve as the basis of judicial review. *See*, Cane & Greenspon, *Securities Arbitration: Bankrupt, Bothered and Bewildered*, 7 Stan. J.L. Bus & Fin. 131, 151-52 (Spring 2002). Defendant's expert, Michael Perino, a securities industry advocate, offered no

meaningful rebuttal to that criticism. *See* Tr. Perino, 9/03/03, at 60-61.

42. The pre-dispute arbitration provision, which is the subject of the motion to compel, severely limits the opportunity of claimants to discover facts necessary to prove a claim such as a company's business practices, viz:

> Pre-arbitration discovery is generally more limited than and different from court proceedings.

Additionally, securities industry arbitration rules discourage discovery except to a very limited extent. Depositions are "strongly discouraged," and limited to "exceptional circumstances." *Corbett Report,* Plaintiffs' Exhibit 3, at 17. There has also been criticism of the limited role of discovery in arbitration cases, because securities firms can effectively "stonewall" discovery requests and delay production of information until the time of the hearing. *See Cox,* Langevoort, Hillman, *Cases and Materials on Securities Regulation* (Aspen Publishers), at 1159.

43. Because of the limited role of discovery in securities arbitration, the ability of a litigant to discover matters not specifically related to the investor's account is severely compromised, making it difficult, if not impossible, to establish a company's business practice. In the instant case, allegations of improper business practices are central to Plaintiffs' tort claims and other claims surrounding the manner in which the Defendants Piper Jaffray and Tom O'Neill conducted their business, and the manner in which Piper supervised and encouraged O'Neill to maintain business practices previously determined to be improper. *See,* generally, Plaintiffs' complaints on file herein.

CONCLUSIONS OF LAW

A. Conclusions of Law Regarding Tomazich Account.

1. The procedure for analyzing a Motion to Compel Arbitration is set forth in Mont. Code Ann. § 27-5-115 which provides in relevant part:

> **Proceedings to compel or stay arbitration.**
>
> (1) On the application of a party showing an agreement described in 27-5-114 and the opposing party's refusal to arbitrate; the district court shall order the parties to proceed with arbitration; but if the opposing party denies the existence of the agreement to arbitrate, the court shall proceed summarily to the determination of that issue raised and shall order arbitration if it finds for the applying party or deny the application if it finds for the opposing party.
>
> (2) On application, the district court may stay an arbitration proceeding commenced or threatened on a showing that there is no agreement to arbitrate. Such an issue, when in substantial and bona fide dispute, shall be immediately and summarily tried and the stay ordered if the court finds for the applying party. If the court finds for the opposing party, it shall order the parties to proceed to arbitration.

In this case, there exists a substantial and bona fide dispute concerning the enforceability of the alleged arbitration provisions. Pursuant to *Kingston v. Ameritrade, Inc.*, 2000 MT 269, 302 Mont. 90, 12 P.3d 929, this Court must, therefore, conduct a hearing to obtain evidence to resolve the dispute. Such hearings have been held. Piper has the initial burden of establishing a valid agreement to arbitrate.

2. In *Kloss,* a case very similar to the present case, the Montana Supreme Court found that a standardized arbitration agreement was beyond the *Kloss* plaintiffs reasonable expectations because the arbitration agreement was not explained to her and she had relied upon her investment advisor to explain significant features of her account to her. *Kloss,* ¶ 28. The facts and circumstances of the instant case are nearly identical to those in *Kloss.* Like Mrs. Koss, Steve Tomazich relied on Mr. O'Neill to explain salient account features to him, particularly in light of Steve's physical and cognitive infirmities which were well-known to Mr. O'Neill.

3. Plaintiff's reliance on Defendant's expertise, and his trust in Defendants' good intentions, is no less in the present case than it was in the *Kloss* case. Based on the relationship between the parties and Plaintiff's reliance on Defendants, Defendants should have explained the provisions in the agreement. Defendants presented no evidence whatsoever to suggest that Mr. Tomazich's reliance upon his broker, in light of the relationship which had arisen between Mr. O'Neill and the Tomazich's, was misplaced or unreasonable.

4. Based on the foregoing, the arbitration provision was entirely outside of the reasonable expectations of the Plaintiff and should not be enforced against him.

B. Contracts of Adhesion (Common Conclusions)

5. A contract of adhesion is one in which "the terms are dictated by one contracting party to another who has no voice in its formulation." *Kloss,* 2002 MT 129, ¶24 (citing *Corbin on Contracts,* § 1.4 at 13 (1993)).

6. "Contracts of adhesion arise when a standardized form of agreement, usually drafted by the party having superior bargaining power, is presented to a party, whose choice is either to accept or reject the contract without the opportunity to negotiate its terms." *Kloss,* 2002 MT 129 ¶24 (quoting *Passage v. Prudential Bache Securities, Inc.* (1986), 223 Mont. 60, 66, 727 P.2d 1298, 1301-02 (citations omitted)).

7. In *Passage v. Prudential-Bache Securities, Inc.* (1986), 223 Mont. 60, 727 P.2d 1298, the Montana Supreme Court described contracts of adhesion in the Securities context and the circumstances under which they are unenforceable as follows:

> . . . [T]he investor is faced with an industry wide practice of including Arbitration Clauses in standardized brokerage contracts. As the investor faces the possibility of being excluded from the securities market unless he accepts a contract with such an agreement to arbitrate, such clauses come within the adhesion doctrine. However, mere inequality in bargaining power does not render a contract unenforceable, nor are all standardized contracts unenforceable. As a consequence of current commercial realities, form forum clauses will control, absent a strong showing it should be set aside. For such a contract or clause to be void, it must fall within judicially imposed limits of enforcement. It will not be enforced against the weaker party when it is: (1) not within the reasonable expectations of said party or (2) within the reasonable expectations of the party, but, when considered in its context, is unduly oppressive, unconscionable, or against public policy. [Citations omitted.]

8. In contracts of adhesion, the contract terms are "dictated by one party to another who has no bargaining power and no realistic options." *Kloss,* 2002 MT 129 ¶24. If the party in the lesser bargaining position has no meaningful opportunity to negotiate or reject the terms of a contract, the contract is one of adhesion. *See Circuit City v. Mantor,* 335 F.3d 1101 (9th Cir. 2003) (applying California law).

9. "A meaningful opportunity to negotiate or reject the terms of a contract must mean something more than an empty choice. *At a minimum, a party must have reasonable notice of his opportunity to negotiate or reject the terms of a contract, and* he must have an actual, meaningful, and reasonable choice to exercise that discretion." *Circuit City v. Mantor,* 335 F.3d 1101, 1106 (9th Cir. 2003) (applying California law). (emphasis added).

10. Based upon the Court's Findings of Fact 14 through 33, Piper's account agreements at issue in this litigation are contracts of adhesion, and the arbitration clauses they contain come within the adhesion doctrine. *Kloss,* 2002 MT 129 ¶24 (quoting *Passage,* 727 P.2d at 1301-02 (quotations omitted)).

11. The supposed "opt out" policy does not defeat the adhesive nature of these contracts because the Plaintiffs did not have notice of its existence and, in any event, on its terms, the "opt out" option is within the discretion of the branch manager rather than available upon request after notice.

C. Piper's Pre-Dispute Arbitration Provision is Unconscionable (Common Conclusions)

12. Having demonstrated that Piper's Account Agreements are contracts of adhesion, the Court must determine whether the arbitration provision is unconscionable and oppressive.

13. In accordance with *Kloss v. Edward Jones & Co., supra,* the Court has considered the following eight (8) factors which the Montana Supreme Court has held to be determinative of the unconscionability of brokerage accounts containing a pre-dispute arbitration clause. In that regard, the Court, based upon its findings of fact set forth, *supra,* concludes as a matter of law:

(1) The arbitration panel in a securities case is disproportionately employed in the security industry's business.

(2) Repeat players are favored in securities arbitration, as opposed to workers or consumers.

(3) Filing fees are far greater in securities industry arbitration than the filing fees in Montana district courts.

(4) Arbitrators' fees can make small claims prohibitive and discriminate against investors of modest means.

(5) Securities arbitrations are private proceedings conducted in private places by private parties, and the resulting award is made without a written decision explaining the basis or rationale of the decision. As a result, the proceedings are shrouded in secrecy

and thereby conceal from the public illegal, oppressive, or wrongful practices.

(6/7) Securities arbitration is expressly designed to excuse arbitrators from being bound by the facts or the law, and is designed to preclude arbitrators from disclosing to the parties written reasons which would explain the basis of their decision. As a result, securities arbitrators are not, as a practical matter, bound by either the facts or the law.

(8) Claimants have virtually no meaningful opportunity to discover facts necessary to prove a claim such as a company's business practices.

14. Based upon Findings of Fact 34 through 43, the Court finds that Piper's pre-dispute arbitration provision is unconscionable and oppressive and therefore unenforceable.

D. Piper's Pre-Dispute Arbitration Provision Was Not Within the Plaintiff(s)' Reasonable Expectation (Common Conclusions).

15. Based upon the Findings of Fact herein, this Court finds that pre-dispute arbitration was not within the reasonable expectation of the Plaintiff(s) and therefore Piper cannot enforce its alleged pre-dispute arbitration provision.

E. Piper Has Failed to Demonstrate that the Plaintiff(s) Voluntarily, Knowingly, and Intelligently Waived Their Constitutional Rights to a Jury Trial and Access the Courts (Common Conclusions).

16. The right of trial by jury is secured to all and shall remain inviolate. Article II, Section 26, Montana Constitution. This constitutionally guaranteed right is fundamental and deserving of the highest level of court scrutiny and protection. *State v. LaMere,* 2000 MT 45, 298 Mont. 358, 2 P.3d 204.

17. Courts of justice shall be open to every person and speedy remedy afforded for every injury to person, property, or character. Article II, Section 16 Montana Constitution. This right is as fundamental as any other Article II right because the right of access to the courts is included within the Constitution's Declaration of Right and without the right to access the courts other Article II rights would have little protection from infringement, and, thus, little meaning. *Kloss,* supra (Nelson, J. concurring) at ¶ 57.

18. Constitutional rights that cannot be enforced are illusory. *Id.* at ¶ 58.

19. A waiver of a fundamental right must be proven to have been made voluntarily, knowingly and intelligently – typically by the party seeking the waiver. *Id.* at ¶ 64.

ORDER

Based upon the Findings of Fact herein, the Court finds that Piper has failed to demonstrate a voluntary,

knowing, and intelligent waive by the Plaintiff of his constitutional rights.

Accordingly, it is hereby

ORDERED that the Defendant's Motion to Compel Arbitration and Stay Proceedings is DENIED.

DATED this 7th day of April, 2004.

/s/ Kurt Krueger
Kurt Krueger
District Court Judge

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MONTANA SECOND JUDICIAL DISTRICT COURT
SILVER BOW COUNTY

STEPHEN C. TOMAZICH, Plaintiff, vs. USBANCORP PIPER JAFFRAY INC., PIPER JAFFRAY, INC., ROBERT ENGLISH AND THOMAS J. O'NEILL, Defendants.	)	**CAUSE NO.** DV-02-131

COMPLAINT AND DEMAND FOR JURY TRIAL

(Filed May 17, 2002)

COMES NOW the Plaintiff, Stephen C. Tomazich, by and through his counsel, Poore, Roth & Robinson, P.C., and for his cause of action against Defendants, alleges as follows:

PARTIES

1. Plaintiff Stephen C. Tomazich is a resident of Butte, Silver Bow County, Montana, and a citizen of the State of Montana.

2. Defendant USBancorp Piper Jaffray Inc. is a Delaware corporation qualified to do business in the state of Montana and does business in the state of Montana, and is a registered securities broker/dealer with the State of Montana.

3. Defendant Piper Jaffray, Inc., was, at times relevant to the allegations of this complaint, a securities broker-dealer registered in the state of Montana with offices located at 222 South 9th Street, Minneapolis, Minnesota 55402-3804, Upon information and belief, Defendant Piper Jaffray, Inc., changed its business name to USBancorp Piper Jaffray Inc. on or about September 1998. Defendants Piper Jaffray, Inc. and USBancorp Piper Jaffray Inc. are collectively referred to herein as "Piper Jaffray."

4. Defendant Robert English ("English") is, and at all times relevant to the allegations of this complaint was, the branch manager and supervisor of Piper Jaffray Inc.'s and USBancorp Piper Jaffray Inc.'s offices in Butte, Silver Bow County, Montana, and a registered broker-dealer in the state of Montana. Defendant English is a citizen of the State of Montana residing at Butte, Montana.

5. Defendant Thomas J. O'Neill ("O'Neill") was, at all times relevant to the allegations of this Complaint, an investment executive in the employ of and under the control of Piper Jaffray Inc., USBancorp Piper Jaffray Inc., or its predecessors as a securities salesman, and is a registered salesperson and/or broker-dealer in the state of Montana pursuant to § 30-10-103, Mont. Code Ann. Defendant O'Neill is a citizen of the State of Montana residing at Butte, Montana.

ALLEGATIONS COMMON TO ALL CLAIMS

6. On or around May 19, 1997, Plaintiff entered into a contract with Defendants Piper Jaffrey and O'Neill wherein Plaintiff invested his entire IRA savings with Defendants.

7. At the time of investing this money with Defendants, Plaintiff was 48 years old. He had recently been placed on long-term, permanent disability from his employment. Plaintiff's disability stems from having been born with hydrocephalus, pursuant to which Plaintiff has suffered from seizures and essential tremors throughout his life. Also associated with his condition are memory and comprehension problems.

8. Despite this setback, Plaintiff maintained productive and gainful employment for thirteen (13) years with Safeway, and then for an additional fifteen (15) years with the Montana Power Company in its mail department. He ultimately was placed on long-term, permanent disability after his essential tremors and seizures increased in severity and prevented him from being able to perform the tasks associated with his employment.

9. During his 28 years of employment, Plaintiff saved money for his retirement. Upon the authorization of Individual Retirement Accounts (IRA) by Congress, Plaintiff began investing the maximum annual amounts in his IRA with a Federal Credit Union. He transferred this savings of $48,528 by depositing it with Defendants on May 19, 1997, as alleged herein.

10. Thereafter, Defendants acted as Steve's stockbroker and investment portfolio manager. The account was established individually as a self directed IRA.

11. In establishing his account with Defendants, Plaintiff identified his investment objectives as (1) Growth, (2) Income, and (3) Safety.

12. At all times Defendant O'Neill knew, and Defendants English and Piper Jaffray knew or should have known, that Plaintiff's investment needs and objectives were for safe investments that would grow and produce income over time, in that Plaintiff at the time was just 48 years of age, on long-term disability and highly unlikely to ever be able to work again to generate additional retirement savings.

13. Nearly within a week of receiving Plaintiff's deposit, and continuing until Plaintiff moved his account in July 1998, Defendants engaged in a course of conduct of intentionally, fraudulently, maliciously and deceptively manipulating Plaintiffs' account for their own personal benefit and/or purposes and objectives, and in complete, conscious, and intentional disregard and violation of Plaintiffs' investment objectives and needs.

14. Shortly after receiving Plaintiff's deposit, and continuing until July 26, 1998, Defendants, without authorization or instruction, purchased and sold highly speculative securities in Plaintiff's account that were entirely inappropriate for Plaintiff's investment objectives and needs, not only maintaining a significant portion of Plaintiff's retirement savings in highly speculative technology, "dot com" and small cap stocks, but also churning these securities holdings by purchasing the highly inappropriate securities, maintaining them in Plaintiff's account for short time periods before selling them, only to repurchase them shortly thereafter. Each of these trades bore undisclosed, significant, unreasonable and excessive

costs and commissions which were charged to Plaintiff's account.

15. Defendants acted entirely outside of their authority in soliciting, recommending, initiating and engaging in such trading activity. Plaintiff did not direct or authorize Defendants to engage in such trading activity. Defendants, moreover, unreasonably solicited and initiated these unsuitable and excessive trades, did not seek or receive Plaintiff's express, knowing, informed approval or authorization prior to engaging in such trading activity, and did not advise or inform Plaintiffs of these activities or of the significant unreasonable and excessive commissions and other costs and risks associated therewith.

16. These trades were excessive in size and frequency in light of the Plaintiff's financial objectives and resources. These trades were unsuitable and unreasonably exposed Plaintiff to market risks entirely inappropriate for someone of Plaintiff's station in life, and were inconsistent with his stated and obvious investment objectives. These trades were very costly to Plaintiff and profitable to Defendants.

17. During the sixteen months that Plaintiff maintained his account with Defendants, Defendants, without Plaintiff's instruction or authorization, initiated and engaged in an estimated 57 unauthorized, speculative and unsuitable trades on Plaintiff's account, each bearing undisclosed, unreasonable and excessive transaction costs and commissions.

18. Such unauthorized, speculative and unsuitable trades generated commissions estimated at approximately $5,575, and additionally generated significant investment

losses to Plaintiff's account. Such unreasonable, excessive commissions alone depleted over 10% of Plaintiff's initial deposit, i.e., an annualized 10% of Plaintiff's initial account value was paid to Defendants as commissions generated from sales. These commissions were not adequately or appropriately disclosed to Plaintiffs, and were not authorized or agreed to by to Plaintiff.

19. Defendants purchased shares of stock, without authorization or instruction, only to sell them within days thereafter, sometimes in two separate lots on the same day or within just days of each other, thereby generating additional commissions. This activity generated commissions for Defendants' benefit far in excess of any benefit to Plaintiffs, resulting in significant losses to Plaintiffs.

20. In addition to repeatedly purchasing, selling and churning many of the securities in Plaintiffs' account without instruction or authorization, as described above, Defendants would randomly and sporadically, without authorization and instruction, engage in isolated purchases and sales of individual securities, thereby generating additional commissions for themselves, without regard to Plaintiffs' investment needs and objectives. Such trades produced more revenue for Defendants to Plaintiff's detriment.

21. Such unauthorized, inappropriate and unsuitable investing and excessive trading by Defendants was for the purpose of generating commissions and profits for the Defendants, which in fact it did. Said trading was in total and complete disregard of the financial and investment needs and objectives of the Plaintiff.

22. As of September 1998, as a result of Defendants' intentional, fraudulent, deceitful, malicious and deceptive

manipulation of Plaintiff's account for their own personal benefit and/or purposes and objectives, and in complete, conscious, and willful disregard and violation of Plaintiff's investment objectives and needs, Plaintiff's account suffered recognized net investment losses estimated at $19,578.58 during the sixteen month the funds remained at Piper Jaffray. This represents a third of Plaintiff's initial account value. Plaintiff made no withdrawals during that time period whatsoever. These losses occurred despite the bull market that existed during that time period, during which significant growth should have occurred, and steady income derived, if the investment objectives had been followed. This depletion in value was attributable solely to the conduct, acts and omissions of Defendants.

23. On or around April 11, 2001, Plaintiff received a notice from the Montana State Auditors office, advising him of possible fraudulent and deceitful activity by Defendants in the management and administration of their account, Plaintiff subsequently learned he was one of 38 victims of dishonest and deceitful conduct for which the State Auditor's Office sought to revoke Defendant O'Neill's securities broker license.

24. All the acts of Defendant O'Neill alleged herein were within the course and scope of his employment with Defendants USBancorp Piper Jaffray Inc. and Piper Jaffray, Inc. (collectively "Piper Jaffray"). Defendants Piper Jaffray and English directly or indirectly controlled O'Neill's actions and both knew and had reasonable grounds to know, and should have known, of such acts, misrepresentations, omissions, and O'Neill's course of conduct, had they exercised a reasonable system of internal

supervision of its salespersons, brokers and investment executives which was required of them.

25. Defendant English was a partner, officer, or employee of Piper Jaffray and Defendants English and Piper Jaffray participated and/or materially aided in the transactions alleged herein.

26. At all times material to the allegations of this complaint, Piper Jaffray and English failed to maintain and enforce a proper system of internal supervision over defendant O'Neill, in violation of its duties.

27. In fact, from March 1997 through March 1998, O'Neill was under special supervision by English and Piper Jaffrav pursuant to a Consent Decree entered into between Piper Jaffray and the Montana State Auditors' office regarding suspected practices by O'Neill in violation of the Montana Securities Act. Although Piper Jaffray, English and O'Neill admitted to no such violations, Piper Jaffray and English agreed to special supervision of O'Neil and his account activity, the terms of which are contained in a Consent Decree before the State Auditor's Office, which was signed in May 1997.

28. Moreover, routine, periodic reports generated by Piper Jaffray and reviewed by Piper Jaffray and English clearly revealed the excessive inappropriate trading activity and unreasonable and excessive commissions generated by O'Neill.

29. Rather than supervise O'Neill and discourage his excessive and unauthorized trading and borrowing activity, Piper Jaffray and English ignored the special supervision terms and failed to investigate O'Neill's improper trading activity. To the contrary, Defendants Piper Jaffray

and English encouraged such activity to such a degree that O'Neill routinely was rewarded for his malicious and deceitful activities. Defendants Piper Jaffray and English knowingly profited significantly from O'Neill's fraudulent, deceitful, unauthorized and unlawful conduct.

30. As a result of the acts, misrepresentations, omissions, and course of conduct of the Defendants alleged herein, the Plaintiffs have suffered damages in an amount to be determined at trial.

COUNT ONE

FRAUD

31. Plaintiffs incorporate by reference the allegations of paragraphs 1 through 40 as if fully set forth herein.

32. Defendants entered into an investment, arrangement with Plaintiff in which Defendants agreed to invest Plaintiff's assets in accordance with Plaintiff's instructions and directions, using their special knowledge and experience and expertise to further Plaintiff's investment objectives, and investment objectives appropriate to someone of Plaintiff's age, status and means.

33. Instead, Defendants embarked upon a scheme of fraud consisting of intentional and deceitful misrepresentations, inducements, concealment, unauthorized and excessive activity, and nondisclosure of known facts designed to reasonably mislead Plaintiff into believing that Defendants intended to, and in fact were, investing his retirement securities in a manner which would meet the Plaintiff's obvious and stated needs and conservative investment objectives.

34. Defendants induced and persuaded Plaintiff to invest and maintain his account with Defendants and in accordance with Defendants' suggestions, recommendations and solicitations, based upon the representation that Defendants were experts in the securities investment field, that Plaintiff should rely on their expertise and knowledge, and that Plaintiff's account would be managed and invested in accordance with his directions and investment objections.

35. Defendants knew that the representations, promises and assurances made to Plaintiff were false, yet Defendants intended that the representations be relied on by Plaintiff, and in fact knew that Plaintiff would rely on Defendants' representations.

36. Defendants concealed from the Plaintiff and failed to disclose to the Plaintiff the true facts that Defendants were investing his funds in highly inappropriate securities, and were profiting significantly from their excessive and speculative trading and borrowing activities on Plaintiff's account, at significant risk and cost to the Plaintiff.

37. Plaintiff did not know Defendants' representations, suggestions, actions and omissions were false and were not in Plaintiff's best interest.

38. In justifiable reliance thereon, Plaintiff did in fact invest and maintain his account with Defendants by and through Defendant O'Neill.

39. Plaintiff had a right to rely upon the representations, promises and assurances of Defendants.

40. Having induced Plaintiff to rely on their expertise and skill in handling the account, and having asserted

and assumed control over the buying and selling of securities for the account, Defendants engaged in the deceptive and manipulative activity alleged herein.

41. Defendant O'Neill illegally and deceptively usurped control and discretion over Plaintiff's account in violation of the contract by engaging in the discretionary, speculative and excessive trading activity as alleged herein without first consulting with Plaintiff and/or obtaining his informed approval.

42. Defendants' actual fraud and misleading actions were intended to deceive the Plaintiff for the benefit of Defendants.

43. As a direct and proximate result of Defendants' fraudulent conduct, Plaintiff has been damaged in his person and his property including, without limitation, damages for alteration of his established course of life, damages for loss of income and lost profits, loss of opportunity, damage to his property, damages for loss of use of his property, all in amounts to be determined at trial.

44. The conduct of Defendants has been malicious, fraudulent, oppressive, and done with conscious or intentional disregard for, and with complete indifference to, the substantial rights of Plaintiff and the high probability of injury to Plaintiff. Such actions and conduct should be punished and set forth as an example to discourage Defendants and others from engaging in such conduct in the future. Such a punishment should be in the form of punitive damages in a just and reasonable amount as determined at trial.

COUNT TWO

DECEIT

45. Plaintiff incorporates by reference the allegations of paragraphs 1 through 44 as if fully set forth herein.

46. During the course of the account relationship and securities transactions between the Plaintiff and Defendants, Defendants knowingly and willfully made specific representations, promises and assurances as stated above, which were false and fraudulent and which deceived Plaintiff with the intent to induce him to alter his position to his risk.

47. Defendants additionally suppressed facts that they were bound and required to disclose to Plaintiff, and gave information of other facts which were likely to mislead Plaintiff for lack of complete disclosure.

48. Defendants' conduct constituted deceit as defined in § 27-1-712, M.C.A.

49. As a direct and proximate result of Defendants' deceitful conduct, Plaintiff has been damaged in his person and his property including, without limitation, damages for alteration of his established course of life, damages for loss of income and lost profits, loss of opportunity, damage to his property, damages for loss of use of his property, all in amounts to be determined at trial.

50. The conduct of Defendants has been malicious, fraudulent, oppressive, and done with conscious or intentional disregard for, and with complete indifference to, the substantial rights of Plaintiff and the high probability of injury to Plaintiff. Such actions and conduct should be

punished and set forth as an example to discourage Defendants and others from engaging in such conduct in the future. Such a punishment should be in the form of punitive damages in a just and reasonable amount as determined at trial.

COUNT THREE

FRAUDULENT INDUCEMENT TO EXECUTE AGREEMENTS TO CAUSE A FORFEITURE OF LEGAL RIGHTS

51. Plaintiff incorporates by reference the allegations of paragraphs 1 through 50 as if fully set forth herein.

52. Defendants, with the intent to defraud Plaintiff, induced him to enter into certain agreements which were intended to cause him harm and injury, and were further intended to cause Plaintiff a loss or forfeiture of his legal rights guaranteed to him under Montana law.

53. Defendants engaged in a deliberate course of conduct to conceal their misconduct and the amounts of monies that they had wrongfully obtained from Plaintiff through their course of conduct. By their conduct, Defendants waived and forfeited any rights or remedies accorded to them in the agreements which they obtained through their fraud.

54. By virtue of Defendants' fraudulent inducements, all agreements and documents which were executed by Plaintiff were null and void in their inception, and by virtue thereof, are unenforceable in all respects. Any such agreements should be set aside and be declared unenforceable.

COUNT FOUR

BREACH OF FIDUCIARY DUTY

55. Plaintiff incorporates by reference the allegations of paragraphs 1 through 54 as if fully set forth herein.

56. Upon the acceptance of Plaintiff's new account application, and furthermore upon selecting, initiating and engaging in unauthorized and excessive trades on Plaintiff's account, activating his margin loan, and managing his account thereafter, the Defendants acted in an advisory capacity to the Plaintiff in managing the retirement portfolio to provide Plaintiff with the security, stability, income, and asset protection required.

57. Defendants were aware that Plaintiff was an unsophisticated investor who was relying upon their expertise, and that Plaintiff would trust their advice and actions about the best way of investing his portfolio to achieve his stated and obvious objectives.

58. As a result, a special relationship arose between the parties by which the Defendants owed to the Plaintiff a fiduciary duty to act in Plaintiff's best interest, and replace Plaintiff's interest ahead of their own.

59. Defendant knew, or reasonably should have known, that the unauthorized, excessive and speculative trading and churning activity, and the investment mix maintained with regard to Plaintiff's account, was violative of Plaintiff's best interests.

60. Defendants knew or reasonably should have known, that the costs and commissions Defendants were charging Plaintiff for such excessive, unauthorized trading

were unreasonable, inequitable and excessive, and violative of Plaintiff's best interests.

61. Nevertheless, Defendants engaged in such activity, and charged such interest and commissions, to which Plaintiff had not agreed, to further their own interests at the expense of the Plaintiff, and in conscious or reckless disregard of the substantial rights of Plaintiff.

62. As a direct and proximate result of Defendants' breaches of fiduciary duties owed to the Plaintiff, the Plaintiff has been damaged in his person and his property including, without limitation, damages for alteration of their established course of life, damages for loss of income and lost profits, loss of opportunity, damage to his property, damages for loss of use of his property, all in amounts to be determined at trial.

63. The conduct of Defendants has been malicious, fraudulent, oppressive, and done with conscious or intentional disregard for, and with complete indifference to, the substantial rights of Plaintiff and the high probability of injury to Plaintiff Such actions and conduct should be punished and set forth as an example to discourage Defendants and others from engaging in such conduct in the future. Such a punishment should be in the form of punitive damages in a just and reasonable amount as determined at trial.

COUNT FIVE

CONSTRUCTIVE FRAUD

64. Plaintiff incorporates by reference the allegations of paragraphs 1 through 63 as if fully set forth herein.

65. As the salesperson and broker in this relationship, Defendants had a duty to disclose the full terms of the relationship between the parties, including the scope of Defendants' authority (and lack of authority) to engage in trades on Plaintiff's behalf and pursuant to Plaintiff's investment objectives, and to engage in margin activities.

66. As the salesperson and broker in these transactions, Defendants had a duty to disclose to the Plaintiff their recommended trade activities before such trades were executed.

67. As the salesperson and broker in these transactions, Defendants had a duty to refrain from engaging in unauthorized and excessive trading activity.

68. As the salesperson and broker in this transaction Defendants had a duty to disclose the commissions and costs of their trading activities, and to refrain from charging unreasonable, excessive and unauthorized commissions and costs.

69. Defendants did not make such proper and adequate disclosures to Plaintiff.

70. By their actions the Defendants engaged in constructive fraud, which directly and proximately caused the Plaintiff's injuries and damages as alleged herein.

71. As a direct and proximate result of Defendants' fraudulent and deceitful conduct, Plaintiff has been damaged in his person and his property including, without limitation, damages for alteration of his established course of life, damages for loss of income and lost profits, loss of opportunity, damage to his property, damages for loss of use of his property, all in amounts to be determined at trial.

72. The conduct of Defendants has been malicious, fraudulent, oppressive, and done with conscious or intentional disregard for, and with complete indifference to, the substantial rights of Plaintiff and the high probability of injury to Plaintiff. Such actions and conduct should be punished and set forth as an example to discourage Defendants and others from engaging in such conduct in the future. Such a punishment should be in the form of punitive damages in a just and reasonable amount as determined at trial.

COUNT SIX

NEGLIGENCE

73. Plaintiff incorporates by reference the allegations of paragraphs 1 through 72 as if fully set forth herein.

74. Defendants owed a duty of care to Plaintiff to exercise reasonable investment practices and reasonable commercial standards of fair dealing in the securities and investment industry.

75. By reason of the actions and omissions stated herein, Defendants breached their duty of care to Plaintiff, including, without limitation, (i) failing to exercise reasonable investment practices in light of the circumstances; (ii) failing to disclose the risks of loss and the costs and commissions associated with their activities; (iii) failing to obtain authority for their trading activities; (iv) usurping and assuming a discretionary role in Plaintiff's account without authorization; (v) liquidating Plaintiff's fixed income and mutual fund securities to invest in inappropriate technology

sector stocks; and (vi) excessively and inappropriately funding and churning Plaintiff's account.

76. As a direct and proximate result of Defendants' negligence, the Plaintiff has been damaged in his person and his property including, without limitation, damages for alteration of his established course of life, damages for loss of income and lost profits, loss of opportunity, damage to his property, damages for loss of use of his property, all in amounts to be determined at trial.

77. The conduct of Defendants has been malicious, fraudulent, oppressive, and done with conscious or intentional disregard for, and with complete indifference to, the substantial rights of Plaintiff and the high possibility of injury to Plaintiff. Such actions and conduct should be punished and set forth as an example to discourage Defendants and others from engaging in such conduct in the future. Such a punishment should be in the form of punitive damages in a just and reasonable amount as determined at trial.

COUNT SEVEN

NEGLIGENT SUPERVISION

78. Plaintiff incorporates by reference the allegations of paragraphs 1 through 77 as if fully set forth herein.

79. Defendants Piper Jaffray and English had a duty to supervise the activities of their employee and stock salesman, Defendant O'Neill.

80. This duty was particularly heightened in that Defendant O'Neill had previously engaged in fraudulent,

deceitful and speculative activity on other accounts, resulting in a Consent Agreement with the Montana State Auditor's office pursuant to action commenced by the Montana State Auditor's office on behalf of another investor.

81. Defendants Piper Jaffray and English failed to adequately supervise Defendant O'Neill in accordance with the terms of the Consent Agreement.

82. Defendant O'Neill's acts and omissions as alleged herein were foreseeable to Defendants Piper Jaffray Inc. and English.

83. Defendant O'Neill's acts and omissions were known to Defendants Piper Jaffray and English.

84. Plaintiff's damages as alleged herein are the proximate and direct result of Defendants' Piper Jaffray and English failure to adequately supervise Defendant O'Neill.

85. The conduct of Defendants has been malicious, fraudulent, oppressive, and done with conscious or intentional disregard for, and with complete indifference to, the substantial rights of Plaintiff and the high possibility of injury to Plaintiff. Such actions and conduct should be punished and set forth as an example to discourage Defendants and others from engaging in such conduct in the future. Such a punishment should be in the form of punitive damages in a just and reasonable amount as determined at trial.

COUNT EIGHT

BREACH OF CONTRACT

86. Plaintiff incorporates by reference the allegations of paragraphs 1 through 85 as if fully set forth herein.

87. The contract between Defendants and Plaintiff provided that Defendants had no authority to purchase or sell securities without the instruction and direction of Plaintiff.

88. Defendants breached the contract by purchasing and selling securities on their own volition and accord and without the instruction of Plaintiff.

89. Defendants breached the contract by engaging in these unauthorized and excessive trades.

90. Defendants breached the contract by failing to reasonably disclose the fees, costs and commissions associated with such activity.

91. Defendants breached the contract by failing and refusing to properly invest and maintain Plaintiff's investments in accordance with Plaintiff's stated investment objectives of income, safety and growth, and *not* speculation.

92. The contract between the parties contained an implied covenant that Defendants would act in good faith and engage in fair dealing in the administration and implementation of the contract, and would act fairly and in good faith in the discretion which was granted to Defendants under the agreement. The conduct required by the implied covenant required the Defendants to be honest

in fact and observe reasonable commercial standards of fair dealing.

93. In their treatment of the Plaintiff in all of the ways heretofore alleged, the Defendants acted dishonestly, deceitfully, arbitrarily, capriciously, and unreasonably to deny the Plaintiff the benefits of the contract, and to deny his justifiable expectations that Defendants would act honestly and reasonably in the performance of the contract.

94. Defendants' conduct and breach of their obligation to act fairly and in good faith to the Plaintiff constitutes a breach of the covenant of good faith and fair dealing contained in the contract, and is therefore a breach of the contract.

95. As a result of Defendants' breach of their contractual obligation, Plaintiff has been damaged as alleged herein.

COUNT NINE

TORTUOUS BREACH OF THE COVENANT OF GOOD FAITH AND FAIR DEALING

96. Plaintiff incorporates by reference the allegations of paragraphs 1 through 95 as if fully set forth herein.

97. By virtue of the special relationship between the parties, as heretofore alleged, the Plaintiff is entitled to tort damages as the direct and proximate result of the Defendants' breach of the covenant of good faith and fair dealing and violation of their obligation to act fairly and in good faith to the Plaintiff.

98. The conduct of Defendants has been malicious, fraudulent, oppressive, and done with conscious or intentional disregard for, and with complete indifference to, the substantial rights of Plaintiff and the high possibility of injury to Plaintiff. Such actions and conduct should be punished and set forth as an example to discourage Defendants and others from engaging in such conduct in the future. Such a punishment should be in the form of punitive damages in a just and reasonable amount as determined at trial.

COUNT TEN

INTENTIONAL AND NEGLIGENT INFLICTION OF EMOTIONAL DISTRESS

99. Plaintiff incorporates by reference the allegations of paragraphs 1 through 98 as if fully set forth herein.

100. In the establishment and administration of the account described herein, Defendants negligently and intentionally entered into a course of conduct which they knew, or reasonably should have known, would cause the Plaintiff great financial distress and hardship.

101. Defendants knew, or reasonably should have known, that as a result of their actions, Plaintiff would stand at risk to lose his entire retirement portfolio, which constitutes Plaintiff's only source of retirement funds, as Plaintiff is on long-term, permanent disability from work and has no means or opportunity to earn additional funds to replace those which he invested with Defendants.

102. As the direct and proximate result of the Defendants' conduct, Plaintiff has suffered severe emotional distress and mental anguish, for which the Defendants are liable in addition to compensatory damages.

103. The conduct of Defendants has been malicious, fraudulent, oppressive, and done with conscious or intentional disregard for, and with complete indifference to, the substantial nights of Plaintiff and the high possibility of injury to Plaintiff. Such actions and conduct should be punished and set forth as an example to discourage Defendants and others from engaging in such conduct in the future. Such a punishment should be in the from of punitive damages in a just and reasonable amount as determined at trial.

COUNT ELEVEN

PUNITIVE DAMAGES

104. Plaintiff incorporates by reference the allegations of paragraphs 1 through 103 as if fully set forth herein.

105. As alleged herein, Defendants had knowledge of facts or intentionally disregarded facts that created a high probability of injury to the Plaintiff and: (a) deliberately proceeded to act in conscious or intentional disregard of the high probability of injury to the Plaintiff; or (b) deliberately proceeded to act with indifference to the high probability of injury to the Plaintiff.

106. As alleged herein, Defendants made representations with knowledge of their falsity or concealed material facts with the purpose of depriving the Plaintiff of property or legal rights or otherwise causing injury.

Plaintiff had a right to rely on the representations of Defendants and suffered injury as a result of that reliance.

107. Defendants should be punished for their actions and conduct as set forth herein, and an example made thereof to discourage and deter Defendants and others from engaging in such outrageous actions and injurious conduct in the future, by an award of punitive damages in a just and reasonable amount, to be determined at trial, sufficient to satisfy such purposes as recognized by law.

COUNT TWELVE

VIOLATION OF THE SECURITIES ACT OF MONTANA

108. Plaintiff incorporates by reference the allegations of paragraphs 1 through 107 as if fully set forth herein.

109. The acts complained of herein committed by the Defendants involved the purchase and sale of "securities" within the meaning of the Securities Act of Montana, Mont. Code Ann. § 30-10-101, *et seq.*

110. As alleged herein, the acts and omissions committed by Defendants constitute (a) a device, scheme and artifice to defraud the Plaintiff and maximize Defendants' profits, at Plaintiff's expense, (b) the making of untrue statements of material fact and omissions of statements of material facts necessary to make statements made not misleading, and (c) acts, practices, and a course of business that operated as a fraud or deceit upon the Plaintiff and others similarly situated, in violation of §§ 30-10-301 and 307, Mont. Code Ann.

111. Defendant English directly and indirectly controlled the securities activities of Defendant O'Neill, was a partner, officer, director or employee of Defendant Piper Jaffray at times relevant to this Complaint and/or materially aided the transactions alleged herein.

112. Defendant Piper Jaffray directly and indirectly controlled the securities activities of Defendant O'Neill, and/or materially aided the transactions alleged herein.

113. Defendants Piper Jaffray, English and O'Neill knew or in the exercise of reasonable care should have known of O'Neill's conduct as alleged herein.

114. Defendants Piper Jaffray Inc. and English are jointly and severally liable for the acts alleged herein pursuant to Mont. Code Ann. § 30-10-307.

115. Plaintiff was damaged by the acts of Defendants as alleged herein.

COUNT THIRTEEN

NEGLIGENCE PER SE

116. Plaintiff incorporates by reference the allegations of paragraphs 1 through 115 as if fully set forth herein.

117. Defendants' conduct alleged herein constitutes numerous violations of the Securities Act of Montana, Mont. Code Ann. § 30-10-101, *et seq*.

118. The Securities Act of Montana was enacted to protect a specific class of persons, namely, individual investors.

119. Plaintiff is a member of the class of persons the Securities Act of Montana was enacted to protect.

120. Plaintiff has been damaged by Defendants' breach of the MSA as alleged herein, and such damages and injury is of the sort the Securities Act of Montana was enacted to protect.

121. The Securities Act of Montana was intended to regulate members of Defendants' class.

122. Defendants' conduct and breaches of the Securities Act of Montana as alleged herein constitutes negligence per se.

123. The conduct of Defendants has been malicious, fraudulent, oppressive, and done with conscious or intentional disregard for, and with complete indifference to, the substantial rights of Plaintiff and the high possibility of injury to Plaintiff. Such actions and conduct should be punished and set forth as an example to discourage Defendants and others from engaging in such conduct in the future. Such a punishment should be in the form of punitive damages in a just and reasonable amount as determined at trial.

WHEREFORE, Plaintiff Stephen C. Tomazich, prays for judgment and relief against the Defendants, as follows:

1. For all damages incurred by the Plaintiff, including all economic damages, damages for emotional distress and mental anguish, and all other compensatory damages which the Plaintiff is reasonably entitled to recover as a result of his claims herein;

2. For special damages, including loss of income and lost profits, loss of earning capacity, and loss of opportunity, damage to Plaintiff's property, damages for loss of use of his property, and investment losses in amounts to be determined at trial;

3. For an order rescinding the agreements between the parties and declaring their terms null and void, and returning the parties to the *status quo ante*, or to a similar status that is reasonably within the ability of the Court to do;

4. For statutory damages pursuant to Mont. Code Ann. § 30-10-307 of the Securities Act of Montana, including, without limitation, recovery of all consideration paid for each unauthorized trade, together with interest at the rate of ten percent (10%) thereon as of the date thereof;

5. For recovery of all interest, costs, commissions and charges paid by Plaintiff to Defendants;

6. For Plaintiff's attorneys' fees;

7. For punitive damages;

8. For an accounting of all commissions received by Defendants and all sales and purchases fraudulently engaged in on Plaintiff's account;

9. For Plaintiffs costs of suit;

10. For prejudgment interest;

11. For all such other and further relief as the Court deems just and proper.

DATED this 17th day of May, 2002.

POORE, ROTH & ROBINSON, P.C.

By /s/ Donald C. Robinson
Donald C. Robinson

By /s/ Lisa A. Levert
Lisa A. Levert
Attorneys for Plaintiff
1341 Harrison Avenue
Butte, Montana 59701

DEMAND FOR JURY TRIAL

COMES NOW the Plaintiff, Stephen C. Tomazich, and demands a trial by jury of all the issues in the above-entitled action.

DATED this 17th day of May, 2002.

POORE, ROTH & ROBINSON, P.C.

By /s/ Donald C. Robinson
Attorneys for Plaintiff
1341 Harrison Avenue
Butte, Montana 59701

No. 04-454

IN THE SUPREME COURT OF THE STATE OF MONTANA

2005 MT 37

HARRY WILLEMS,

Plaintiff and Respondent,

v.

U.S. BANCORP PIPER JAFFRAY, INC., THOMAS J. O'NEILL, ROBERT ENGLISH, and JOHN DOES I through X (Filed Feb. 22, 2005)

Defendants and Appellants.

APPEAL FROM:
District Court of the Second Judicial District,
In and For the County of Cause No. DV 2003-25
Honorable Kurt Krueger, Presiding Judge.

COUNSEL OF RECORD:

For Appellants:

Stanley T. Kaleczyc and Brand G. Boyar, Browning, Kaleczyc, Berry & Hoven, P.C., Helena, Montana

John S. Lutz, Fairfield and Woods, P.C., Denver, Colorado

Robert J. Phillips, Phillips & Bohyer, P.C., Missoula, Montana (O'Neill)

For Respondent:

William P. Joyce, Joyce & Johnston, PLLP, Butte, Montana

Submitted on Briefs: November 30, 2004
Decided: February 22, 2005

Filed:

Ed Smith
Clerk

Justice Jim Rice delivered the Opinion of the Court.

¶1 This case is one of 23 lawsuits filed by individual investors against U.S. Bancorp Piper Jaffray, Inc. (Piper), Robert English (English), and Tom O'Neill (O'Neill). The plaintiff investors made various common law tort claims arising from the alleged mismanagement of their accounts created and maintained by Piper's branch office in Butte, Montana. O'Neill, who was a securities broker in Piper's Butte office,[1] allegedly took the actions that gave rise to the lawsuits, and English was O'Neill's direct supervisor throughout this time. In response to the lawsuits, Piper filed motions to compel arbitration in each case, seeking to enforce "pre-dispute" arbitration clauses – that is, clauses in the account agreements which required any dispute be resolved by arbitration. Piper's motions to compel arbitration led to a series of hearings by a panel of three district court judges, who were sitting individually on the cases, but who sat *en banc* to hear evidence common to all 23 cases. In addition, individual hearings were held with respect to several of the individual plaintiffs. While Piper called common witnesses to testify, O'Neill, in a prior discovery deposition, invoked his Fifth Amendment right against self-incrimination and did not offer testimony regarding the accounts at issue.

[1] At the time the lawsuits were filed, O'Neill was no longer employed at Piper.

¶2 Harry Willems (Willems) is the plaintiff in this matter. On April 7, 2004, the Second Judicial District Court, Silver Bow County, denied Piper's motion to compel arbitration of Willems's claims, and Piper appeals therefrom. We affirm.

¶3 The following issues are raised on appeal in regard to the District Court's denial of Piper's motion to compel:

¶4 Did the District Court err in holding that the PAT Plus Agreements created a fiduciary duty between Piper and Willems that was breached by Piper?

¶5 Did the District Court violate the Federal Arbitration Act and Montana law by holding the arbitration agreement to a different contractual standard when it concluded the PAT Plus Agreements were contracts of adhesion?

¶6 Did the District Court err in applying the *Kloss* factors?

¶7 Did the District Court err in holding that Willems failed to effectively waive his constitutional rights?

¶8 Is the securities arbitration process, held before a self-regulatory organization overseen by the United States Securities and Exchange Commission, fair and reasonable as a matter of law?

¶9 The District Court's order offered an extensive analysis of all issues raised by the parties. The District Court determined that the PAT Plus Agreements were contracts of adhesion; that Piper's pre-arbitration dispute provisions were unconscionable and not within plaintiffs' reasonable expectations; that Piper failed to demonstrate that plaintiffs voluntarily, knowingly, and intelligently waived their constitutional rights to a jury trial and access to the court;

Piper failed to demonstrate that plaintiffs received or reviewed the arbitration provision; and that a fiduciary duty was created by Piper's PAT Plus Agreements and breached by the defendants. We conclude that the issue pertaining to the fiduciary duty is determinative on appeal and therefore will not address the other issues, except as necessary to resolve the dispositive issue.

FACTUAL AND PROCEDURAL BACKGROUND

¶10 In 1986. Willems retained O'Neill as his broker and financial advisor to help him open a Self-Directed Individual Retirement Account (1986 IRA). Later that year, Willems opened a joint Piper Automatic Transfer Account with his wife Marie Willems, which he later upgraded to a Co-Owner Piper Automatic Transfer Plus Account in 1995. On November 9, 1993, Willems opened a Co-Owner Piper Automatic Transfer Plus Account with his mother Bernice Willems. The 1993 and 1995 Piper Automatic Transfer Plus Account agreements hereinafter shall be collectively referred to as the "PAT Plus Agreements."

¶11 Willems claims that O'Neill, supervised by English, engaged in unlawful, unreasonable, and unethical conduct relating to the 1986 IRA, which did not contain a predispute arbitration clause. Willems contests Piper's invocation of the PAT Plus Agreements' arbitration clauses because: (1) his claims are not based upon transactions in these accounts; and (2) Willems was informed that the PAT Plus Agreements were entirely separate and distinct from his 1986 IRA, and therefore had no affect on his 1986 IRA. Conversely, Piper explains that by signing the PAT Plus Agreements, Willems agreed to arbitrate disputes

relating to *any* account he held with Piper, and notes the following language found in both PAT Plus Agreements:

> You agree to arbitrate **any disputes** between Piper Jaffray and you. You specifically agree and recognize that **all controversies** which may arise between Piper Jaffray, its agents, representatives or employees and you concerning any transaction, account of the construction, performance or breach of this or **any other agreement between us, whether entered into prior, on, or subsequent to the date hereof** shall be determined by arbitration to the full extent provided by law. [Emphasis added.]

Thus, it is the arbitration provisions, set forth in the PAT Plus Agreements and incorporating Willems's 1986 IRA, which are at issue herein.

¶12 On January 24, 2003, Willems filed a complaint in the Second Judicial District Court against Piper, English, and O'Neill alleging mismanagement of his 1986 IRA. On March 24, 2003, Piper filed a motion to compel arbitration based upon the provisions of the PAT Plus Agreements requiring arbitration of disputes in any of Willems's accounts. On July 9, August 12, and September 3, 2003, a panel of three district court judges sat *en banc* to hear evidence common to all 23 cases arising from the alleged misconduct of Piper's broker, O'Neill. On April 7, 2004, the District Court denied Piper's motion to compel arbitration and stay proceedings. Piper appeals therefrom.

STANDARD OF REVIEW

¶13 We review whether a district court's conclusions of law are correct in determining whether or not an issue is

subject to arbitration under an existing agreement. *Iwen v. U.S. West Direct*, 1999 MT 63, ¶ 17, 293 Mont. 512, ¶ 17, 977 P.2d 989, ¶ 17. When a district court is asked to compel arbitration of a dispute, the threshold inquiry is whether the parties agreed to arbitrate. *Solle v. Western States Ins. Agency*, 2000 MT 96, ¶ 22, 299 Mont. 237, ¶ 22, 999 P.2d 328, ¶ 22. Because arbitration is a matter of contract, the rules of contract apply, and a party cannot be required to submit to arbitration any dispute that the party has not agreed to submit. *Solle*, ¶¶ 22-23.

¶14 A fiduciary relationship is created whenever a broker has discretion to buy, sell, or otherwise control a client's account. *Chor v. Piper, Jaffray & Hopwood, Inc.* (1993), 261 Mont. 143, 153, 862 P.2d 26, 32. In determining the scope or extent of the fiduciary obligation, our review becomes highly fact intensive. *Kloss v. Edward D. Jones & Co.*, 2002 MT 129, ¶ 35, 310 Mont. 123, ¶ 35, 54 P.3d 1, ¶ 35.

DISCUSSION

¶15 **Did the District Court err in holding that the PAT Plus Agreements created a fiduciary duty between Piper and Willems that was breached by Piper?**

¶16 In *Chor*, we held that § 30-10-301(1), MCA, creates an implied code of conduct for brokers, violations of which may constitute a breach of the duty that a broker owes to his customer. *Chor*, 261 Mont. at 152, 862 P.2d at 31-32. We further held that in the absence of discretionary authority by a broker to buy and sell in a customer's account, no fiduciary relationship is created between the broker and the customer. *Chor*, 261 Mont. at 153, 862 P.2d

at 32. In *Kloss*, we inversely restated that principle, holding that "a fiduciary relationship *is created* whenever a broker has discretion to buy and sell in the client's account." *Kloss*, ¶35. Thus, we begin our analysis by first determining whether the PAT Plus Agreements granted such discretion to Piper's brokers.

¶17 Piper argues that the PAT Plus Agreements did not grant it discretion to make trades on behalf of its clients and therefore did not create a fiduciary duty. Piper contends the District Court improperly interpreted the following underlined contract provisions:

> **Customer's Orders Binding Until Notice of Death**
>
> Upon your death or failure to comply with any part of this Agreement or *whenever Piper Jaffray deems it necessary for its protection, Piper Jaffray is authorized (but is not required) to*:
>
> - Cancel outstanding orders;
> - *Purchase, sell, assign, receive and deliver all or any part of the securities held or carried for you*; and
> - Close out short sales by purchase upon any exchange board or market or any public or private sale at Piper Jaffray's option.

(Underlining added.) In particular, Piper claims that the phrase, "whenever Piper Jaffray deems it necessary for its protection," concerns Piper's rights upon a client's death or when a client is otherwise incapacitated. Piper makes note that upon the death or incapacity of a client, it must have a limited discretion over the client's accounts in case the securities decline in value so that it may ensure it is in

compliance with certain federal requirements, but that this limited discretion is not sufficient to trigger discretion for purposes of creating a fiduciary duty. Thus, Piper urges this Court to not derive a "broad" or "unfettered" grant of discretion from the middle of a provision that merely concerns Piper's rights upon the death or incapacitation of a client.

¶18 Additionally, Piper notes that its Supervisory Procedures Manual provides that a client must execute additional documents if the client wishes to grant discretion to Piper. Piper claims that Willems did not execute the required documentation according to the procedures in the supervisory manual. Piper argues that the fact that Willems's claims include allegations that Piper made "unauthorized transactions" in his 1986 IRA, a nondiscretionary account, is additional evidence that Willems understood that Piper lacked discretion to independently authorize transactions.

¶19 Finally, Piper argues that *Kloss* does not control the outcome here for two reasons. First, Piper asserts that the brokerage account agreement in *Kloss* is distinguishable from the PAT Plus Agreements. Second, it argues that the *Kloss* holding that a broker has a fiduciary duty to disclose and explain the arbitration clause within the account agreement is "in contrast to most statements of law." Piper contends that if a broker had discretion in handling an account, the broker's duties would not extend beyond financial management. Furthermore, Piper claims that brokers should not have the duty to read and explain arbitration clauses to clients since clients come to brokers for financial advice, not legal advice, and the broker may be engaging in the unauthorized practice of law.

¶20 Piper's second *Kloss* argument is essentially an invitation to revisit and reverse our holding in *Kloss*. However, we see no error in the *Kloss* Court's analysis as to the fiduciary duty in this context, and therefore, we decline Piper's invitation to revisit that decision. We reject Piper's argument that such discretion does not create a fiduciary obligation to explain the arbitration provisions, or that such an obligation requires the broker to engage in the unauthorized practice of law. The obligation is one which accompanies the fiduciary relationship created when a broker accepts a customer's authorization to make transactions within the customer's account in the broker's own discretion.

¶21 Willems responds to Piper's first *Kloss* argument by arguing that the language highlighted in the PAT Plus Agreements is similar to the language in the *Kloss* agreement, which provided:

> You may sell any or all property held in any of my accounts and cancel any open orders for the purchase or sale of any property without notice, in the event of my death or whenever in your discretion you consider it necessary for your protection.

Kloss, ¶ 36. We determined that this language granted discretion to the broker to buy and sell securities on behalf of the broker's client. *Kloss*, ¶¶ 36-37. Thus, Willems asserts the District Court properly concluded that the similar language in the PAT Plus Agreements likewise granted such discretion, thereby creating a fiduciary duty on behalf of the broker to explain the consequences of arbitration to clients.

¶22 In spite of Piper's contention that it is required under federal law to have "limited discretion" to make transactions on behalf of its clients to ensure compliance with certain federal requirements, the PAT Plus Agreements contain no provisions or explanations as to this "limitation" or that the discretion granted in the agreement is effective only when securities decline in value. Moreover, the plain meaning of the following language – "upon your death **or** failure to comply with any part of this Agreement **or** whenever Piper Jaffray deems it necessary for its protection" – demonstrates that Piper retained broad authority to purchase, sell, assign, receive and deliver all or any part of the securities held by its clients. (Emphasis added.) Indeed, transactions could be made whenever Piper "deem[ed] it necessary" for its own best interest. Thus, the District Court did not err in concluding that the PAT Plus Agreements granted Piper's brokers discretion to buy and sell securities thereby creating a fiduciary duty.

¶23 Piper contends that the District Court erroneously concluded that a fiduciary duty existed before Willems signed the PAT Plus Agreements. Piper explains that written contracts are only effective at delivery, and therefore a fiduciary duty, triggering an obligation to explain the arbitration provision, could not exist before the PAT Plus Agreements were signed. Willems responds that Piper's argument is misplaced in view of our holding in *Kloss*. Willems argues that when a fiduciary duty is created, even if it is created the very moment *after* the agreement is signed, a broker has a duty to advise its customers – pursuant to its duty of the finest loyalty – as to the nature of arbitration, or if the client may "opt out" of arbitration by crossing out the provision.

¶24 In *Kloss*, an investor opened an account which contained a pre-dispute arbitration clause. We concluded that, because the brokerage firm had discretion to buy and sell securities in the investor's account, a fiduciary relationship was created and the broker had an obligation to explain the effect of an arbitration clause. *Kloss*, ¶ 37. Although we did not state that the obligation arose prior to the actual signing of the agreement, that was, by necessity, the effect of our holding. Entering an agreement which bestows discretion upon the broker requires that the customer be advised of the agreement's arbitration provision so that an informed decision to sign the agreement can be made.

¶25 It is undisputed that Piper did not advise Willems as to the nature of the arbitration clause or that he had the option of crossing out certain provisions. Further, the District Court found, and Piper does not challenge on appeal, that Willems did not understand that by signing the PAT Plus Agreements he was in any way affecting his 1986 IRA. Therefore, in accordance with our holding in *Kloss*, we conclude the District Court did not err in holding that the PAT Plus Agreements created a fiduciary duty between Piper and Willems and that Piper breached its fiduciary duty when it failed to explain the consequences of the arbitration provision prior to the formation of the contract.

¶26 Finally, Piper contends that, pursuant to the *Kloss* Court's determination that the analysis as to whether a fiduciary duty exists is "highly fact intensive," the facts here are distinguishable from those in *Kloss*. It notes that, in *Kloss*, the broker had a regular practice of explaining key contract terms to the customer, and that this led the Court to conclude that the broker had a fiduciary duty to

explain the arbitration provision to the customer. Piper thus reasons that the District Court improperly relied on *Kloss* to create a "special legal standard" regarding fiduciary duties applicable only to arbitration provisions and not to other contract provisions, in violation of the Federal Arbitration Act (FAA) and United States Supreme Court precedent.

¶27 We conclude that the District Court created no new special legal standards but instead properly applied Montana case law by relying on *Kloss*. "The FAA provides that an agreement to arbitrate is valid except where grounds exist at law or in equity to revoke the contract. . . . Montana law also requires the enforcement of predispute arbitration clauses 'except upon grounds that exist at law or in equity for the revocation of a contract.' *Kingston v. Ameritrade, Inc.*, 2000 MT 269, ¶ 13, 302 Mont. 90, ¶ 13, 12 P.3d 929, ¶ 13 (citing § 27-5-114(2), MCA). Though the brokerage firm in *Kloss* had a "regular practice of explaining key contract terms," the enforceability of an arbitration provision is not dependent upon such an office custom or practice. The determination of the existence of a duty here is dependent upon all of the facts, and particularly, the extent of authority or discretion granted by the customer within the agreement.

¶28 We affirm the District Court's conclusion that Piper owed a fiduciary duty to explain the arbitration provision to Willems which was breached, and further, that the predispute arbitration provisions in the PAT Plus Agreements are unenforceable.

/s/ Jim Rice
Justice

We Concur:

/s/ James C. Nelson

/s/ Patricia Cotter

/s/ John Warner

/s/ W. William Leaphart
Justices

KURT KRUEGER
DISTRICT COURT JUDGE, DEPT. I
SILVER BOW COUNTY COURTHOUSE
155 W. GRANITE ST.
BUTTE, MT 59701
406/497-6410

MONTANA SECOND JUDICIAL DISTRICT COURT, SILVER BOW COUNTY

HARRY WILLEMS,	*	
	*	
Plaintiff,	*	
vs.	*	**CAUSE NO. DV-03-25**
	*	
U.S. BANCORP PIPER JAFFRAY, INC., THOMAS J. O'NEILL, ROBERT ENGLISH & JOHN DOES I through X,	*	**FINDINGS OF FACT, CONCLUSIONS OF LAW & ORDER**
	*	(Filed Apr. 7, 2004)
	*	
Defendants.	*	

INTRODUCTION

Almost two dozen individuals who were investors with Piper Jaffray (Piper) at its Branch Office in Butte, Montana, have filed suits in the above-referenced cases against Piper as a result of its business practices and those of its account executive, Tom O'Neill. The lawsuits involve the investors' individual investment accounts which were created and maintained at the Butte office. While, of course, the circumstances surrounding the opening and maintenance of these accounts vary somewhat among those Plaintiffs, there is a similar, if not identical, fact pattern with respect to the essential facts surrounding the actual creation and maintenance of those accounts. Plaintiffs allege a number of common law tort claims which

arise from a variety of illegal business practices, such as "churning," unauthorized trading, and inappropriate trading. Plaintiffs allege that Piper failed to properly supervise O'Neill, who was at the time of his misconduct was subject to a Consent Decree with the Montana State Auditor. The decree arose out of prior misconduct of O'Neill which had been uncovered following an administrative investigation in the early 1990s. Piper had a duty to supervise O'Neill to insure that his misconduct and unethical practices as a broker would not be repeated. Plaintiffs allege that Piper not only allowed, but encouraged, O'Neill to repeat the proscribed business practices which had given rise to the Consent Decree.

Defendants have filed Motions to Compel Arbitration in all of the above-referenced cases. The motions gave rise to a series of hearings by the three Montana District Court Judges to whom these Piper cases have been assigned, Hon. Kurt Krueger, Hon. John W. Whelan, and Hon. Thomas M. McKittrick. Individual hearings took place with respect to many of the Plaintiffs who have a pending claim against Piper. Additionally, the three judges, sitting in an *en banc* configuration, heard the testimony, and received evidence, from "common expert witnesses" and "common fact witnesses." Those "common witness" hearings took place on August 12, 2003, and September 3, 2003, at which Plaintiffs called Professor William Corbett as a common expert witness. Plaintiffs called Jerry Campbell, a former Piper account executive, as a common fact witness. Defendants called Michael Perino, of New York, and Wendy Harmsen, of Minneapolis, as common expert and fact witnesses, respectively.

In a prior discovery deposition, Defendant Tom O'Neill refused to respond to questioning regarding the opening

and formation of Plaintiffs' accounts, citing his Fifth Amendment right against self-incrimination. Thus, there was no testimony presented by Defendants to refute the testimony of any Plaintiff with regard to the opening and maintenance of the account documents which they had signed which contained the pre-dispute arbitration clauses which are the basis of Defendants' motion to compel arbitration.

Following the conclusion of these common hearings, the parties submitted their post-hearing briefs on October 10, 2003.

FINDINGS OF FACT

Findings of Fact Specific for this Plaintiff

1. The Plaintiff Harry Willems is an unsophisticated retired Anaconda Company employee with less than an eighth grade education. (TR, Willems, 7/9/03, pg. 21).

2. Because of his lack of sophistication and education, Mr. Willems was not capable of understanding the language used in Piper's account agreements including the language in the arbitration provision. *Id.*

3. Mr. Willems' dealings with O'Neill date back to the 1980's when O'Neill was with DA Davidson. O'Neill took the account from DA Davidson to Piper when he moved to Piper. *Id.* at 23.

4. Based upon Mr. Willems' testimony and demeanor in court it is apparent that Mr. Willems is a person of limited intelligence. This fact would have been apparent to O'Neill after his first meeting with Mr. Willems. O'Neill was aware that Mr. Willems was unsophisticated and had only an 8th grade education. *Id.* at 24.

5. *Because of his lack of intelligence and extreme lack of* sophistication, Mr. Willems relied on O'Neill to explain beforehand the purpose of the documents he asked Mr. Willems to sign and O'Neill did speak with Mr. Willems about the purpose of the documents he needed Mr. Willems to sign before Mr. Willems was asked to sign the documents. *Id.* at 32.

6. The current litigation involves mismanagement of Mr. Willems' IRA account. *Id.* at 27. Mr. Willems opened the IRA account in March of 1986. The account agreement concerning the IRA does not require that Mr. Willems submit to binding arbitration concerning his IRA. See Plaintiff's Exhibit 1.

7. Mr. Willems had two other accounts with Piper Jaffray. One, a joint PAT Plus account agreement with his mother Bernice Willems (Exhibit A) and another a joint PAT Plus account agreement with his wife Marie (Exhibit B).

8. Both of the PAT Plus account agreements begin with the following language:

> This agreement ("Agreement") sets forth the terms and conditions governing the Piper Jaffray PAT Plus Account ("PAT Plus Account") offered by Piper Jaffray Inc. ("Piper Jaffray"), for which you (all such signatories hereto, whether acting in their individual or representative capacities, are sometimes referred to as "you") are making application with Piper Jaffray.

This language is inconsistent with the following language in the Pre-dispute Arbitration provision which suggests that the account agreement applies to other accounts:

> You agree to arbitrate any disputes between Piper Jaffray and you. You specifically agree

> *and recognize that all controversies* which may arise between Piper Jaffray, its agents, representatives, or employees and you concerning any transaction, account or the construction, performance or breach of this or any other agreement between us, whether entered into prior, on, or subsequent to the date hereof, shall be determined by arbitration to the full extent provided by law.

9. The PAT Plus account agreements also contain the following language which confers discretion on Piper:

> b. "Upon your death or failure to comply with any part of this Agreement *or whenever Piper Jaffray deems it necessary for its protection, Piper Jaffray is authorized (but is not required) to:*
>
> - Cancel outstanding orders;
> - *Purchase, sell, assign, receive and deliver all or any part of the securities held or carried for you;* and
> - Close out short sales by purchase upon any exchange board or market or any public or private sale at Piper Jaffray's option. (Emphasis added) (See Exhibit A)

10. Neither O'Neill nor anyone else at Piper ever advised Mr. Willems about the consequences of the pre-dispute arbitration provisions. Mr. Willems did not understand that the arbitration provisions existed until he spoke with his lawyer during this litigation. *Id.* at 32.

11. When Mr. Willems signed the two PAT Plus agreements he did not know that these accounts contained arbitration. Further, Mr. Willems understood that the joint account with his mother and the joint account

with his wife were separate and distinct accounts and he did not believe that by signing documents relating to these two accounts that he was in any way affecting his IRA account. *Id.* at 28.

12. Mr. Willems signed the joint PAT Plus account with his mother Bernice (Exhibit A) at the urging of O'Neill who told Mr. Willems that this was necessary to look after Mr. Willems' mother. *Id* at 29. This was done because Mr. Willems' mother had become very sick and could not take care of her business anymore and O'Neill told Mr. Willems that he should put his name on the account to make sure that his mother's money could be looked after. *Id.* at 11. Mr. Willems was concerned that if his name was not put on the account that his mother would be conned out of her money. *Id.* at 28.

13. When Mr. Willems had his name placed on his mother's account he did not expect that this was in any way affecting his rights vis-a-vis his IRA in that he understood that those accounts were separate and distinct accounts. *Id.* at 29.

14. When counsel for Piper read portions of the arbitration provisions contained in the PAT Plus account agreements, it was apparent to the Court that Mr. Willems did not understand the language used and Mr. Willems clearly indicated that he did not understand the arbitration provision. In his words, it was all "Greek to me". *Id.* at 15.

15. O'Neill took steps to gain Mr. Willems' trust. He repeatedly advised Mr. Willems that he was looking after his accounts just like he looked after his dad's accounts. O'Neill even made reference to a small notebook on his desk which supposedly contained the names of O'Neill's dad and Mr. and Mrs. Willems. O'Neill would make reference to this notebook and

advised Mr. Willems that he checked the stocks of the peoples whose name were in the notebook everyday and that Mr. Willems did not need to worry. *Id.* at 23. O'Neill further told Mr. Willems that he would check his stock every day just like he checked the stocks of his dad. Based upon these representations Mr. Willems came to trust O'Neill. *Id.* at 24.

16. Mr. Willems and his wife Marie made it clear to O'Neill that they wanted the joint account invested conservatively in a money market account and not in the stock market. O'Neill assured Mr. Willems that the joint account with his wife would be kept entirely separate from his IRA. O'Neill never told Mr. Willems or his wife when they opened up the joint money market account that it would in any way effect his IRA. Mr. Willems understood that the money market account was completely separate from the IRA and this was the only reason Mr. Willems and his wife opened the joint PAT Plus account. *Id.* at 30.

17. Mr. Willems understood that the IRA account had specific rules that did not allow him to make withdrawals whenever he wanted. The joint account, in contrast, could be accessed by he and his wife at any time. These differences in rules regarding access to the accounts provide further support for Mr. Willems' reasonable belief that in signing the PAT Plus account agreement he was not affecting his rights vis-a-vis his IRA.

18. O'Neill did not testify at the hearing although he had the ability and opportunity to do so.

Findings Concerning Contract of Adhesion

19. The contracts at issue in the instant case are standardized form contracts, prepared by Piper Jaffray.

20. Piper Jaffray, because they controlled the Plaintiffs access to the securities market, had superior bargaining power in the transactions at issue herein relative to the Plaintiff who was an unsophisticated investor.

21. The provisions of these form contracts, and in particular the arbitration provisions, are drafted in accordance with industry practice and standards to conform to rules promulgated by the self-regulating organizations (SROs) that govern the entire securities industry. *See* Tr. Perino, 9/3/03, at pg. 44.

22. These contracts and the arbitration provisions they contain are, on their face, contracts of adhesion, in that the form language provides no "opt-out" provision with regard to the arbitration clause, or any other contract provisions. Tr. Corbett, 8/12/03, at pgs. 60-61. The customer is provided no opportunity on the face of the document to select or consent to certain provisions, and not to others. A signature on the document purports to bind the consumer investors to all of the contract terms.

23. Piper did not call any employee from the Butte office to testify that they implemented or were even aware of the alleged "opt out" policy. O'Neill did not testify in this regard. English did not testify in this regard. The only witness who testified about the procedures in the Butte office was Jerry Campbell who was called by the Plaintiffs. Campbell testified that he was unaware of the alleged policy and that based upon his training and experience with Piper, the account documents were to be presented to investors on a take-it-or-leave-it basis. Given that Piper, O'Neill and English all had the ability to testify and establish that the "opt out" policy was a part of the Butte operation and failed to do so and given the testimony of Jerry Campbell the court finds that there was no "opt out" policy in effect in the Butte office and that the account documents

were presented to Butte investors (like the Plaintiff) on a take-it-or-leave-it basis.

24. These account forms, prepared by Piper Jaffray, were presented to the Plaintiffs on a "take it or leave it" basis, in accordance with the manner in which brokers are trained by Piper Jaffray to present these forms to their clients and prospective clients. *See* Tr. Campbell, 9/3/03, pg. 11.

25. Moreover, the new PAT Plus forms presented to many of the plaintiffs for their signatures in 1993 were enclosed with a cover letter, advising that if the customers did not accept the terms of the new account forms, they would be transferred to a fee-paying account. Tr. Harmsen, 9/3/03, at pgs. 213-215. Thus, not only were the contracts presented on a "take it or leave it" basis, but additionally, on a "take it or pay a fee" basis.

26. The letter, while purporting to advise customers of the essential new account terms, failed to inform the Butte branch customers that the new PAT Plus forms contained a pre-dispute arbitration clause, which for many customers, would be included within their account agreements for the first time. *Id.*

27. Plaintiffs herein had no bargaining power or meaningful opportunity to negotiate the terms of their contracts, including the arbitration provision.

28. Piper Jaffray's alleged "opt out" policy relating to the arbitration clause alone, but no other provisions in the form contracts, does not provide investors with a meaningful choice in opting out of the arbitration provision.

29. According to this alleged policy, branch managers are given discretion to permit a customer, at the customer's request, to cross out the arbitration clause in

the account agreement forms. TR. Harmsen, 172, Hearing Exhibit 4.

30. Piper does not apprise potential investors of the existence of the alleged "opt out" policy. Piper's investment executives who open new accounts in accordance with Piper Jaffrays policies, procedures and training do not inform or apprise their customers either of the existence of the arbitration clause, or of the alleged "opt out" policy. Tr. Harmsen, 9/3/03, pg. 216. *See* also Tr. Campbell, 9/3/03, pgs. 11 and 12.

31. To be able to take advantage of this alleged "opt out" option, the Plaintiffs in this litigation would have had to have initiated the discussion with O'Neill, and questioned whether it would be possible to cross out the arbitration provision. Even then, the determination of whether this would be permissible would be made by the Branch Manager.

32. The alleged "opt out" policy was not known to the Butte branch office, from which the Plaintiffs' account originated. The Branch Manager (Bob English) and Mr. Campbell both had never heard of such a policy, and the so-called "policy" itself is centrally maintained in Minneapolis, and not distributed to the branches. Tr. Harmsen, pgs. 175-77. Tr. Campbell at pgs. 8-12 and pg. 20. Tr. English, (in Emett/Merrett hearing), 8/8/2003 pgs. 91-98.

33. It would have been impossible for the Butte office to have implemented the supposed opt-out policy with regard to the Plaintiffs in this litigation without having any knowledge of its existence, particularly in light of the fact that the option lies completely within the discretion of the Butte branch managers, but the Butte branch manager had no knowledge whatsoever that he had such discretion.

34. Plaintiffs did not have reasonable notice of their supposed opportunity to negotiate or reject the arbitration clause. The contracts, on their face, provide no indication that the arbitration provision is optional, and can be crossed out. Piper Jaffray did not inform Plaintiffs that the arbitration provision was negotiable.

35. The Plaintiff in the instant litigation had no actual, meaningful or reasonable choice to negotiate or exercise any discretion with regard to the arbitration provision contained in the standardized Piper Jaffray form contracts.

36. Investors such as Plaintiffs face the possibility of being excluded from the securities market unless they accept Piper Jaffray's contract with such an agreement to arbitrate.

Findings Concerning Unconscionability

37. It is undisputed that under NASD and NYSE rules one of the three arbitrators must be affiliated with the securities industry. There is no requirement that an arbitrator must be affiliated with the industry in which the small investor, or "one time player," is employed. The securities industry will always have one third of the panel represented by it. There is clearly a disparity of representation which is inherently suspect. The securities industry itself has recognized that this disproportionate representation creates an appearance of pro-industry bias.

38. Repeat players are favored in securities arbitrations as opposed to workers or consumers who are unlikely to be involved in arbitration more than one time. According to Professor William Corbett of the University of Montana Law School, who is a very experienced labor arbitrator in the Pacific Northwest, whose testimony

the Court finds credible, empirical studies conducted by legal commentators have concluded that arbitrators tend to favor repeat players.

39. Filing fees for securities arbitration under NASD rules are substantial and far greater than the filing fees imposed in the Montana district courts. It is undisputed that the filing fees for such claims are in the range of $1,400 and $1,500, for a filing fee and a hearing deposit. This conclusion was not disputed by Piper's retained expert, Michael Perino. Fees at the rate of $450 per day for each additional day of a hearing would be charged.

40. Securities arbitration under the required NASD or NYSE rules impose significant arbitrator fees which make small claims prohibitive and discriminate against investors of modest means. In addition to the formal filing fees, an investor located in Montana would be required to either seek a waiver of the requirement that the arbitration be held in a state which has a NASD District Offices, and then pay the lodging and travel expenses of the arbitrators who are required to travel from their states of residence to Montana, or pay the expenses of Montana witnesses who would be required to travel outside of Montana to testify.

41. Additionally, arbitrator fees are $400 per session day, plus $75 additional for the chair person of the three-member panel, or $1,275 per day. Thus, if a case were to last five days, arbitrator fees alone would amount to $6,375, not to mention travel and related lodging expenses. In contrast, in the Montana district courts, no litigant is required to pay for the daily fees or expenses of either judges or juries.

42. The NASD and NYSE rules require private arbitration proceedings, which result in summary decisions

which provide no basis or opportunity for an explanation of the findings of the arbitrators, or the applicable law upon which the decision is based. These rules specifically preclude written decisions explaining their findings of fact and conclusions of law. Professor Corbett concluded that the failure to provide a written. explanatory decision is not only intentional, but touted as an "advantage" of arbitration because the decision makers are not "burdened" with the obligation to explain their decisions. There are no recognized public law reporting publications of securities decisions. This "penchant for secrecy" is an accepted feature of securities arbitration, and therefore frustrates a litigant's effort to seek a vacatur of the award in the courts, and may conceal an intentional disregard of the law. Additionally, as Professor Corbett points out, the failure to explain decision making may obscure biased or erroneous decision making. Securities arbitration proceedings thus become shrouded in secrecy because they are conducted in private forums which excludes public decision making. As a result, wrongdoing or other oppressive conduct by the securities industry or its members precludes any meaningful expose of such conduct and activities.

43. Securities arbitration is expressly designed to excuse arbitrators from being bound by the facts or law. It is expressly designed to preclude arbitrators from disclosing to the parties written reasons which would explain the basis of their decision. The pre-dispute arbitration provision at issue in this case recites that:

> The arbitrators' award is not required to include factual findings or legal reasoning and any party's right of appeal to seek modification of rulings is strictly limited.

44. Many legal commentators have rightfully criticized the securities industry for insisting that its arbitration processes be expressly designed to preclude explanatory decisions which can serve as the basis of judicial review.

45. The pre-dispute arbitration provision, which is the subject of the motion to compel, severely limits the opportunity of claimants to discover facts necessary to prove a claim such as a company's business practices. This fact is stated clearly in Piper's own arbitration provision, to wit:

> Pre-arbitration discovery is generally more limited than and different from court proceedings.

Additionally, securities industry arbitration rules discourage discovery except to a very limited extent. Depositions are "strongly discouraged", and limited to "exceptional circumstances". There has also been criticism of the limited role of discovery in arbitration cases, because securities firms can effectively "stonewall" discovery requests and delay production of information until the time of the hearing.

46. Because of the limited role of discovery in securities arbitration, the ability of a litigant to discovery matters not specifically related to the investor's account is severely compromised, making it difficult, if not impossible, to establish a company's business practice. In the instant case, allegations of improper business practices are central to Plaintiffs' tort claims and other claims surrounding the manner in which the Defendant Piper Jaffray and O'Neill conducted their business and the manner in which Piper supervised and encouraged O'Neill to maintain business practices previously determined to be improper. See Plaintiff's Complaint.

CONCLUSIONS OF LAW

Piper's Burden of Proof

1. The procedure for analyzing a Motion to Compel Arbitration is set forth in §27-5-115 MCA which provides in relevant part:

> Proceedings to compel or stay arbitration. (1) On the application of a party showing an agreement described in 27-5-114 and the opposing party's refusal to arbitrate, the district court shall order the parties to proceed with arbitration; but if the opposing party denies the existence of the agreement to arbitrate, the court shall proceed summarily to the determination of that issue raised and shall order arbitration if it finds for the applying party or deny the application if it finds for the opposing party; (2) On application, the district court may stay an arbitration proceeding commenced or threatened on a showing that there is no agreement to arbitrate. Such an issue, when in substantial and bona fide dispute, shall be immediately and summarily tried and the stay ordered if the court finds for the applying party. If the court finds for the opposing party, it shall order the parties to proceed to arbitration.

In this case, there exists a substantial and bona fide dispute concerning the enforceability of the alleged arbitration provisions. Pursuant to *Kingston v. Ameritrade, Inc.*, 2000 MT 269, 302 Mont. 90, 12 P.3d 929 this Court must therefore, conduct a hearing to obtain evidence to resolve the dispute. Such hearings have been held. Piper has the initial burden of establishing a valid agreement to arbitrate.

Fiduciary Duty Created by Piper's PAT Plus Agreement and O'Neill's Representations

2. In *Kloss v. Edward D. Jones* the Montana Supreme Court held that a fiduciary relationship is created whenever a broker has discretion to buy and sell securities in a client's account. The discretion to buy and sell can arise from the language in the account agreement. In *Kloss* the court found that the following language created a fiduciary duty on behalf of the broker and brokerage house:

   > You may sell any and all property held in any of my accounts and cancel any open orders for the purchase or sale of any property without notice, in the event of my death or whenever in your discretion you consider it necessary for your protection. *Id.* at paragraph 36.

3. The *Kloss* court also held that if a pre-dispute arbitration provision is contained in an agreement that creates a fiduciary relationship then the broker and brokerage house has a duty to explain the consequences of the pre-dispute arbitration provision they seek to enforce. *Id.* at paragraph 38.

4. The language contained in Piper's PAT Plus Agreements set forth in Finding of Fact number 9 creates a fiduciary duty on behalf of Piper and O'Neill to explain the consequences of the arbitration provisions Piper seeks to enforce.

5. The scope of or extent of a fiduciary obligation depends on the facts of the case. *Kloss,* supra at ¶ 31, In *Deist v. Wacholz,* 208 Mont. 207, 678 P.2d 188 (1984) the Montana Supreme Court found that a fiduciary duty arose when a bank officer undertook to provide financial advise [sic] to an elderly customer concerning the sale of her ranch. Because of Mr. Willems extreme unsophistication and lack of education which

O'Neill was aware of and because of the representation that O'Neill made about looking after his accounts like he did his father's account, O'Neill established a fiduciary relationship with Mr. Willems which also gives rise to the duty to explain arbitration.

6. Because neither Piper nor O'Neill explained the consequences of the arbitration provision in the PAT Plus Agreements and because of the existence of the fiduciary duty, Piper cannot now enforce those arbitration provisions are unenforceable.

Piper's Account Agreements are Contracts of Adhesion

7. A contract of adhesion is a contract whose terms are dictated by one contracting party to another who has no voice in its formation. *Kloss* at paragraph 24, citing Corbin on Contracts, section 1.4 at 13 (1993).

8. "Contracts of adhesion arise when a standardized form of agreement, usually drafted by the party having superior bargaining power, is presented to a party, whose choice is either to accept or reject the contract without the opportunity to negotiate its terms." *Kloss*, 2002 MT 129 ¶ 24 (quoting *Passage v. Prudential Bache Securities, Inc.* (1986), 223 Mont. 60, 66, 727 P.2d 1298, 1301-02 (citations omitted)).

9. In *Passage v. Prudential-Bache Securities, Inc.* (1986), 223 Mont. 60, 727 P.2d 1298, the Montana Supreme Court described contracts of adhesion in the Securities context and the circumstances under which they are unenforceable as follows:

> . . . [T]he investor is faced with an industry wide practice of including Arbitration Clauses in standardized brokerage contracts. As the investor faces the possibility of being

> excluded from the securities market unless he accepts a contract with such an agreement to arbitrate, such clauses come within the adhesion doctrine. However, mere inequality in bargaining power does not render a contract unenforceable, nor are all standardized contracts unenforceable. As a consequence of current commercial realities, form forum clauses will control, absent a strong showing it should be set aside. For such a contract or clause to be void, it must fall within judicially imposed limits of enforcement. It will not be enforced against the weaker party when it is: (1) not within the reasonable expectations of said party or (2) within the reasonable expectations of the party, but, when considered in its context, is unduly oppressive, unconscionable, or against public policy. [Citations omitted.]

10. In contracts of adhesion, the contract terms are "dictated by one party to another who has no bargaining power and no realistic options." *Kloss,* 2002 MT 129 ¶24. If the party in the lesser bargaining position has no meaningful opportunity to negotiate or reject the terms of a contract, the contract is one of adhesion. *See Circuit City v. Mantor,* 335 F.3d 1101 (9th Cir. 2003) (applying California law).

11. "A meaningful opportunity to negotiate or reject the terms of a contract must mean something more than an empty choice. *At a minimum, a party must have reasonable notice of his opportunity to negotiate or reject the terms of a contract, and* he must have an actual, meaningful, and reasonable choice to exercise that discretion." *Circuit City v. Mantor,* 335 F.3d 1101, 1106 (9th Cir. 2003) (applying California law). (emphasis added).

12. Based upon the above Findings of Fact, Piper's account agreements are determined to be contracts of adhesion.

Piper's Pre-Dispute Arbitration Provision is Unconscionable

13. In *Kloss* the Court set forth the following eight factors which this Court must examine in determining the issue of the conscionability of Piper's pre-dispute arbitration provision:

    1. Are potential arbitrators disproportionately employed in one or the other party's field of business?

    2. Do arbitrators tend to favor "repeat players" as opposed to workers or are unlikely to be involved in arbitration again? In other words, is there a tendency by arbitrators to avoid decisions which will result in the loss of future contracts for their services?

    3. What are the filing fees for arbitration compared to the filing fees in Montana's district courts?

    4. What are arbitrators' fees? Do they make small claims prohibitive? Do they discriminate against consumers or workers of modest means?

    5. Are arbitration proceedings shrouded in secrecy so as to conceal illegal, oppressive or wrongful business practices?

    6. To what extent are arbitrators bound by the law?

7. To what extent are arbitrators bound by the facts?

8. What opportunity do claimants have to discover the facts necessary to prove a claim such as a company's business practices?

14. Based upon the above Findings of Fact, the Court finds that Piper's pre-dispute arbitration provision is unconscionable and therefore unenforceable.

Piper's Pre-Dispute Arbitration Provision Was Not Within The Plaintiff's Reasonable Expectations

15. Based upon the above Findings of Fact the Court concludes that Mr. Willems' reasonable expectation when signing Exhibit A was to protect his mother by placing his name on her account. Mr. Willems' reasonable expectations did not include agreeing to binding arbitration of disputes concerning his IRA account which is the subject of this litigation.

16. Based upon the above Findings of Fact, the Court concludes that Mr. Willems' reasonable expectation in signing Exhibit B was to establish a conservative money market account with his wife. These expectations had nothing to do with his IRA. Therefore, Mr. Willems did not reasonably expect that by signing Exhibit B he was agreeing to binding arbitration of disputes concerning his IRA which is the subject of this litigation.

Piper Has Failed to Demonstrate that the Plaintiff Voluntarily, Knowingly, and Intelligently Waived His Constitutional Rights to a Jury Trial and Access the Courts

17. The right of trial by jury is secured to all and shall remain inviolate. Article II, Section 26, Montana Constitution. This constitutionally guaranteed right is fundamental and deserving of the highest level of court scrutiny and protection. *State v. LaMere,* 2000 MT 45, 298 Mont. 358, 2 P.3d 204.

18. Courts of justice shall be open to every person and speedy remedy afforded for every injury to person, property, or character. Article II, Section 16 Montana Constitution. This right is as fundamental as any other Article II right because the right of access to the courts is included within the Constitution's Declaration of Right and without the right to access the courts other Article II rights would have little protection from infringement, and, thus, little meaning. *Kloss,* supra (Nelson, J. concurring) at ¶ 57.

19. Constitutional rights that cannot be enforced are illusory. *Id.* at ¶ 58.

20. A waiver of a fundamental right must be proven to have been made voluntarily, knowingly and intelligently – typically by the party seeking the waiver. *Id.* at ¶ 64.

ORDER

Based upon the Findings of Fact herein, the Court finds that Piper has failed to demonstrate a voluntary, knowing, and intelligent waive by the Plaintiff of his constitutional rights.

Accordingly, it is hereby

ORDERED that the Defendant's Motion to Compel Arbitration and Stay Proceedings is DENIED.

DATED this 7th day of April, 2004.

/s/ Kurt Krueger
KURT KRUEGER
District Court Judge

Piper Jaffray Self-directed IRA

APPLICATION

PIPER JAFFRAY

* * *

C. ACCEPTANCE, ARBITRATION AGREEMENT AND SIGNATURE . . .

(4) The Customer Agrees to Arbitrate:

- **Arbitration is final and binding on the parties.**
- **The parties are waiving their right to seek remedies in court, including the right to jury trial.**
- **Pre-arbitration discovery is generally more limited than and different from court proceedings.**
- **The arbitrators' award is not required to include factual findings or legal reasoning and any party's right to appeal or to seek modification of rulings by the arbitrators is strictly limited.**
- **The panel of arbitrators will typically include a minority of arbitrators who were or are affiliated with the securities industry.**

I agree to arbitrate any disputes between Piper Jaffray and me. I specifically agree and recognize that all controversies which may arise between Piper Jaffray, its agents, representatives or employees and me, concerning any transaction, account or the construction, performance or breach of this or

any other agreement between Piper Jaffray and me, whether entered into prior, on, or subsequent to the date hereof, shall be determined by arbitration to the full extent provided by law. Such arbitration shall be in accordance with the rules then in effect, of the Arbitration Committee of the New York Stock Exchange, Inc. or the National Association of Securities Dealers, Inc. as I may elect. I authorize Piper Jaffray, if I do not make such election by registered mail addressed to Piper Jaffray at its main office within 15 days after receipt of notification from Piper Jaffray requesting such election, to make such election on my behalf. However, it is understood, no person shall bring a putative or certified class action to arbitration, nor seek to enforce any pre-dispute arbitration agreement against any person who has initiated in court a putative class action; who is a member of a putative class who has not opted out of the class with respect to any claims encompassed by the putative class action until: (i) the class certification is denied; (ii) the class is decertified; or (iii) the customer is excluded from the class by the court.

Such forbearance to enforce an agreement to arbitrate shall not constitute a waiver of any rights under this agreement except to the extent stated herein.

I UNDERSTAND THAT THIS AGREEMENT CONTAINS A PRE-DISPUTE ARBITRATION CLAUSE AT PARAGRAPH 4 ABOVE, AND I ACKNOWLEDGE RECEIPT OF A COPY OF THIS AGREEMENT.

No. 04-455

IN THE SUPREME COURT OF THE
STATE OF MONTANA

2005 MT 282

NANCY ZIGRANG,

Plaintiff and Respondent,

v.

U.S. BANCORP PIPER JAFFRAY, INC., PIPER JAFFRAY, INC., ROBERT ENGLISH and THOMAS J. O'NEILL, and JOHN DOES I through X,

Defendants and Appellants.

APPEAL FROM: District Court of the Second Judicial District, In and for the County of Silver Bow, Cause No. DV-02-77, The Honorable Kurt Krueger, Judge presiding.

COUNSEL OF RECORD:

For Appellants U.S. Bancorp Piper Jaffray, Inc., and Robert English:

Stanley T. Kaleczyc, Brand G. Boyar, Browning Kaleczyc Berry & Hoven, P.C., Helena, Montana

John S. Lutz, Fairfield and Woods, P.C., Denver, Colorado

For Respondent:

Tina L Morin, Poor Roth & Robinson, P.C., Butte, Montana

Submitted Briefs: April 20, 2005

Decided: November 8, 2005

Filed:

/s/ Ed Smith
Clerk

Justice Brian Morris delivered the Opinion of the Court.

¶1 Appellant U.S. Bancorp Piper Jaffray, Inc. (Piper), appeals from the decision of the Second Judicial District Court, Silver Bow County, denying its motion to compel arbitration of claims asserted by Respondent Nancy Zigrang (Zigrang). We remand for further proceedings.

¶2 We address whether the District Court properly ruled that the arbitration clause contained in the SEP-IRA agreement signed by Zigrang is enforceable as to the claims against Piper and, therefore, whether Zigrang must arbitrate her dispute.

PROCEDURAL AND FACTUAL BACKGROUND

¶3 This case represents one of twenty-three lawsuits tiled by individual investors against Piper, Robert English (English), and Tom O'Neill (O'Neill) involving the alleged mismanagement of accounts in Piper's corporate offices in Butte. *See Willems v. U.S. Bancorp Piper Jaffray, Inc.*, 2005 MT 37, 326 Mont. 103, 107 P.3d 465. This particular action concerns an investment agreement Zigrang entered with Piper that contained an arbitration provision.

¶4 Zigrang is a 68-year-old woman with a high school education who has worked various jobs in and around Butte for the better part of five decades. Zigrang retained O'Neill in 1993 to open a simplified employee pension

individual retirement account (SEP-IRA) for the purpose of investing a little money for retirement. The SEP-IRA agreement contained an arbitration provision.

¶5 Zigrang signed the agreement after a brief discussion with O'Neill regarding the general maintenance of the account. O'Neill did not advise Zigrang that the agreement contained a provision to arbitrate any dispute that could arise between Piper and her. O'Neill never informed Zigrang that she could "opt out" of any of the provisions contained within the agreement, including the arbitration provision.

¶6 Zigrang filed a complaint on April 5, 2002, after learning that O'Neill frequently had traded securities in her account without obtaining her approval. Zigrang alleged that O'Neill had purchased and sold securities in rapid succession in order to generate unnecessary and excessive costs and commissions against Zigrang's account. Piper filed a motion to compel arbitration on August 14, 2002, based upon the provision of the SEP-IRA agreement requiring arbitration of disputes in Zigrang's account.

¶7 A panel of three district court judges sat *en banc* to hear evidence common to all twenty-three cases arising from O'Neill's alleged misconduct on July 9, August 12, and September 3, 2003. The District Court denied Piper's motion to compel arbitration and stay proceedings on April 7, 2004. The order issued by the District Court, however, includes common findings of fact that do not apply to Zigrang. The order mistakenly states that Zigrang held a PAT Plus agreement with Piper and fails to mention the SEP-IRA that Zigrang actually held. Piper's PAT Plus agreement grants O'Neill some discretion to trade securities.

The terms of the SEP-IRA agreement signed by Zigrang, however specifically prohibit O'Neill from having any discretion at all. This appeal follows.

STANDARD OF REVIEW

¶8 We review a district court's order refusing to compel arbitration *de novo* to determine whether its conclusions of law prove correct. *Iwen v. U.S. West Direct,* 1999 MT 63, ¶ 17, 293 Mont. 512, ¶ 17, 977 P.2d 989, ¶ 17. When a district court compels arbitration, or refuses to compel arbitration, the threshold Inquiry remains whether the parties agreed to arbitrate. *Solle v. Western State Ins. Agency, Inc.,* 2000 MT 96, ¶ 22, 299 Mont. 237, ¶ 22, 999 P.2d 328, ¶ 22.

DISCUSSION

¶9 The facts and issues arising in this case bear substantial similarity to those presented in *Willems.* We held in *Willems* that a clause in a PAT Plus account agreement granting Piper broad discretion over an investor's holdings creates a fiduciary duty. *Willems,* ¶ 22. This fiduciary duty obligated Piper to advise the investor of the consequences of an arbitration clause before the formation of the contract. *Willems,* ¶ 25. Piper's failure to so advise the investor rendered the arbitration clause unenforceable. *Willems,* ¶ 28. The differences between the PAT Plus account agreement in *Willems* and the SEP-IRA agreement here require us, however, to evaluate further the enforceability of the arbitration agreement at issue.

The Federal Arbitration Act

¶10 The Federal Arbitration Act (FAA) provides that arbitration provisions found in contracts affecting interstate commerce are valid and enforceable "save upon such grounds as exist at law or in equity for the revocation of any contract," 9 U.S.C. § 2. The sale of securities through a public stock exchange falls within the ambit of the Act. *Passage v. Prudential-Bache Securities, Inc.* (1986), 223 Mont. 60, 65, 727 P.2d 1298, 1301. The FAA applies to disputes under state court jurisdiction. *See Southland Corp. v. Keating* (1984), 465 U.S. 1, 104 S.Ct. 852, 79 L.Ed.2d 1.

¶11 Piper contends that the District Court thwarted the FAA's intent and purpose by ruling the arbitration provision unenforceable in light of the fact that the act represents a federal and state policy favoring arbitration. *See Shearson/American Express, Inc. v. McMahon* (1987), 482 U.S. 220, 107 S.Ct. 2332, 96 L.Ed.2d 185; *Chor v. Piper, Jaffray & Hopwood, Inc.* (1993), 261 Mont. 143, 862 P.2d 26. The intent of the FAA, however, does not include thwarting applicable state contract law. State law applies "if that law arose to govern issues concerning the validity, revocability, and enforceability of contracts generally." *Perry v. Thomas* (1987), 482 U.S. 483, 492 n.9, 107 S.Ct. 2520, 2527 n.9,.96 L.Ed.2d 426. Thus, generally applicable contract formation defenses, such as fraud, duress, or unconscionability, may be applied to invalidate arbitration agreements without contravening the FAA. *Doctor's Associates, Inc. v. Casarotto* (1996), 517 U.S. 681, 687, 116 S.Ct. 1652, 1656, 134 L.Ed.2d 902; *Iwen,* ¶ 26. States may not craft special rules however, that apply only for the purpose of defeating arbitration. *Iwen,* ¶ 26.

Contracts of Adhesion

¶12 We first must analyze the nature of the agreement between Zigrang and Piper before we can evaluate the enforceability of the arbitration provision. This Court has recognized that brokerage agreements may represent contracts of adhesion. *Kloss v. Edward D. Jones & Co.*, 2002 MT 129, ¶ 27, 310 Mont. 123, ¶ 27, 54 P.3d 1, ¶ 27. The Court in *Willems* did not need to reach the issue of whether the PAT Plus account agreement constitutes a contract of adhesion in light of its holding that the discretionary nature of the account imposed a fiduciary duty on Piper. *Willems,* ¶ 9. This fiduciary duty obligated Piper to advise the investor of the consequences of the arbitration provision. *Willems,* ¶ 25. The SEP-IRA agreement at issue here granted Piper no similar discretionary authority on its face.

¶13 The availability of Zigrang's potential contract formation defenses hinges on our determination of whether the SEP-IRA agreement, absent discretionary authority to Piper, constitutes a contract of adhesion. Generally applicable contract law states that an adhesion contract will not be enforced against the weaker party if it is (1) not within their reasonable expectations, or (2) within their reasonable expectations, but, when considered in its context, proves unduly oppressive, unconscionable or against public policy. *Iwen,* ¶ 27.

¶14 Contracts of adhesion arise when a party possessing superior bargaining power presents a standardized form of agreement to a party whose choice remains either to accept or reject the contract without the opportunity to negotiate its terms. *Kloss,* ¶ 24. We have noted that investors face the possibility of being excluded from the

securities market unless they accept a contract containing an arbitration provision. *Kloss,* ¶ 27. In *Kloss* we concluded that a standardized investment form drafted by the broker and presented to the investor with no opportunity to negotiate the terms, constituted a contract of adhesion that excluded the investor from the securities market unless she accepted the agreement to arbitrate. *Kloss,* ¶ 27.

¶15 We agree with the District Court that Piper's SEP-IRA, agreement represents a contract of adhesion. O'Neill provided Zigrang with a standardized form agreement, in this case the SEP-IRA, prepared by Piper, on a "take it or leave it" basis. Zigrang, an elderly woman with no experience with investment services had no bargaining power or opportunity to negotiate the terms of the contract if she chose to invest. Zigrang would have been excluded from the securities market if she did not accept the agreement to arbitrate. *See Kloss,* ¶ 27.

¶16 Piper contends that its investment agreements do not represent adhesion contracts because it maintains a policy allowing clients to "opt-out" of any offending provision. The District Court found, however, that Piper's alleged "opt-out policy" merely consisted of miscellaneous memoranda containing anecdotes or account summaries, many pages of which fail to mention arbitration. English, the branch manager of Piper, had not heard of the alleged policy. No one had ever brought him an account where an investor had attempted to strike a provision. In fact, to the best of his knowledge. the alleged policy cannot be found in the office's procedural manual and Piper does not train account executives to discuss the "opt-out" policy with clients.

¶17 The fact that the SEP-IRA agreement in this case represents a contract of adhesion, with nothing more, does not constitute a sufficient basis for invalidating the agreement. The adhesive nature of a contract only supports other contract formation defenses. *Iwen,* ¶ 28. We turn then to potential contract formation defenses asserted by Zigrang, including reasonable expectations and unconscionability.

¶18 This Court will not enforce the arbitration provision in a contract of adhesion if it is (1) not within Zigrang's reasonable expectations or (2) within her reasonable expectations, but, when considered in its context, proves unduly oppressive, unconscionable or against public policy. *Passage,* 223 Mont. at 66, 727 P.2d at 1302. Zigrang also contends that she did not voluntarily, knowingly, and intelligently waive her constitutional right to a jury trial.

Contract Formation Defenses

¶19 We cannot complete our examination of Zigrang's contract formation defenses however, because the District Court's order relies on a mistaken finding of fact. The order states that Zigrang held a PAT Plus agreement with Piper, rather than the SEP-IRA that Zigrang actually held. Thus, we must remand to the District Court for further findings of fact relating to the SEP-IRA investment agreement concerning potential contract formation defenses raised by Zigrang, including unconscionability, waiver, and reasonable expectations. We provide the following guidance to the District Court on remand as it attempts to analyze Zigrang's potential contract formation defenses. Her reasonable expectations likely will influence

the outcome of this analysis. *See Transamerica Ins. Co. v. Royle* (1983), 202 Mont. 173, 180-81, 656 P.2d 820, 824.

¶20 The inquiry into an investor's reasonable expectations in an adhesion contract consists only of an analysis of the investor's objectively reasonable expectations regarding the investment agreement. This Court considers objectively reasonable expectations from the investor's perspective. *See Iwen*, ¶ 29; *Transamerica,* 202 Mont. at 180-81, 656 P.2d at 824. Thus, the terms of the investment agreement will be construed as laymen would understand it and not according to the interpretation of sophisticated stockbrokers. An investor's objectively reasonable expectations should be honored even if a painstaking study of the agreement would negate those expectations. *See Transamerica*, 202 Mont. at 180-81, 656 P.2d at 824. Zigrang's objectively reasonable expectations, therefore, may negate the arbitration provision of an investment agreement in the same manner that any contract may be negated by this state law defense. *Casarotto,* 517 U.S. at 687.

¶21 Regardless of the type of investment agreement, Piper contends that the conspicuous presence of the arbitration provision in the investment agreement, with nothing more, proves sufficient to demonstrate objectively reasonable expectations. This Court in *Transamerica* held invalid a provision included in an insurance policy, however, because it failed to honor the policy holder's reasonable expectations. *Transamerica,* 202 Mont. at 180, 656 P.2d at 824.

¶22 The issue in *Transamerica* concerned an insurance company's obligation to defend or provide coverage for parents who were sued by their daughter who was injured

in an accident in which the mother was the driver. *Transamerica,* 202 Mont. at 174, 656 P.2d at 821. The insurance policy contained a "household exclusion clause" that excluded coverage for injuries to any person related to the insured who resided in the same household. *Transamerica,* 202 Mont. at 174, 656 P.2d at 821. The fact that the policy represented an adhesion contract justified the Court's decision to consider reasonableness from the perspective of the policy holder. *Transamerica,* 202 Mont. at 180-81, 656 P.2d at 824. This Court held that the "household exclusion clause" failed to meet the reasonable expectations of the purchaser of the policy. *Transamerica,* 202 Mont. at 180, 656 P.2d at 824.

¶23 The fact that Zigrang's investment agreement constitutes a contract of adhesion likewise supports consideration of reasonableness from her perspective. Thus, the mere presence of an arbitration provision in an investment agreement, though conspicuous, does not bring the provision within the reasonable expectations of an investor in every instance.

¶24 In fact, our review of the SEP-IRA agreement reveals the presence of other similarly conspicuous provisions not addressed by the District Court and apparently not raised by the parties. For example, a clause directly above the arbitration provision in the SEP-IRA agreement states: "I understand that I have the full responsibility for directing the investment of my account and that no transactions will occur in my account unless I (or another authorized person) so direct." The SEP-IRA agreement also contains a letter from the Internal Revenue Service that authorizes Piper to act as the custodian or passive trustee only in accordance with federal income tax regulations. *See* 26 C.F.R. § 1.408-2(e) (2005). Federal regulations permit

Piper only to acquire and hold particular investments specified by Zigrang. Piper cannot act as the trustee of Zigrang's SEP-IRA account if the investment agreement grants them any discretion to direct investment within the account. *See* 26 C.F.R. § 1.408-2(e)(6)(i)(A)-(B) (2005).

¶25 The District Court must assess Zigrang's reasonable expectations in light of the entire SEP-IRA agreement. We remand to the District Court for findings of fact concerning the SEP-IRA account Zigrang actually held with Piper. The District Court must evaluate Zigrang's contract formation defenses, including reasonable expectations, unconscionability, and waiver of jury trial, as they relate to the terms of the SEP-IRA agreement.

/s/ Brian Morris
Justice

We Concur:

/s/ Jim Rice

/s/ Patricia Cotter

/s/ John Warner

/s/ W. William Leaphart

/s/ James Nelson
Justices

CASE STATUS AS OF 12/07/05

Plaintiff	MT Supreme Court Docket No.	Disposition
Terri A. Bagley v. U.S. Bancorp Piper Jaffray Inc., et al.	Case No. 04-446	Appeal dismissed after mediation
Vicki Berryman v. U.S. Bancorp Piper Jaffray Inc., et al.	Case No. 04-585	Petition for Writ of Certiorari Denied, No. 05-86
Sandra Brown v. U.S. Bancorp Piper Jaffray Inc., et al.	Case No. 04-447	Appeal dismissed after mediation
John P. and Audrey Daly v. U.S. Bancorp Piper Jaffray Inc., et al.	Case No. 04-490	Petition for Writ of Certiorari Denied, No. 05-86
Roberta J.Emett/Kathleen E. Merrett v. U.S. Bancorp Piper Jaffray Inc., et. al.	Case No. 04-517	Petition for Writ of Certiorari Denied, No. 05-86
Estate of Alice A. Franey U.S. Bancorp Piper Jaffray Inc., et. al.	Case No. 04-493	Petition for Writ of Certiorari Denied, No. 05-86
Joseph Froehlich, et al. v. U.S. Bancorp Piper Jaffray Inc., et. al.	Case No. 04-495	Settled at mediation/to be dismissed
Raymond Kaufman, et al. v. U.S. Bancorp Piper Jaffray Inc., et. al.	Case No. 04-491	Petition for Writ of Certiorari Pending, No 05A199
James Leary v. U.S. Bancorp Piper Jaffray Inc., et al.	Case No. 04-448	Petition for Writ of Certiorari Denied, No. 05-86
Suzanne McGee v. U.S. Bancorp Piper Jaffray Inc., et. al.	Case No. 04-494	Appeal dismissed after mediation
Margaret McGrath v. U.S. Bancorp Piper Jaffray Inc., et. al.		Dismissed after mediation but before appeal filed
Debbie Mueller v. U.S. Bancorp Piper Jaffray Inc., et. al.	Case No. 04-530	Appeal dismissed after mediation
Mike Paffhausen v. U.S. Bancorp Piper Jaffray Inc., et. al.	Case No. 04-449	Pending in MT Sup. Ct.
Juanita Periman v. U.S. Bancorp Piper Jaffray Inc., et al.	Case No. 04-450	Settled at mediation/to be dismissed
Evelyn Pickett v. U.S. Bancorp Piper Jaffray Inc., et. al.	Case No. 04-533	Settled at mediation/to be dismissed
John D. Shea and Brenda Shea v. U.S. Bancorp Piper Jaffray Inc., et. al.	Case No. 04-451	Petition for Writ of Certiorari Denied, No. 05-86
James and Brenda Shea v. U.S. Bancorp Piper Jaffray Inc., et. al.	Case No. 04-532	Appeal dismissed after mediation
James Staedt v. U.S. Bancorp Piper Jaffray Inc., et. al.	Case No. 04-492	Appeal dismissed after mediation
Stephen C. Tomazich v. U.S. Bancorp Piper Jaffray Inc., et. al.	Case No. 04-452	Affirmed by MT Sup. Ct.
Robert and Sheryl Tremis v. U.S. Bancorp Piper Jaffray Inc., et. al.	Case No. 04-453	Appeal dismissed after mediation
Shirley A. Turley v. U.S. Bancorp Piper Jaffray Inc., et. al.	Case No. 04-431	Settled at mediation/to be dismissed
Harry Willems v. U.S. Bancorp Piper Jaffray Inc., et. al.	Case No. 04-454	Affirmed, then dismissed as a result of mediation
Nancy Zigrang v. U.S. Bancorp Piper Jaffray Inc., et. al.	Case No. 04-455	Remanded by MT Sup. Court for further findings